No. 88-192

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JOINT APPENDIX VOLUME I

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PETITION FOR CERTIORARI FILED, July 28, 1988
CERTIORARI GRANTED, November 14, 1988

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CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

Case No. _____
FL. BAR # 353574

McKESSON CORPORATION
(dba McKESSON WINE & SPIRITS
CO., MIAMI CROWN DISTRIBUTORS,
and PALM BEACH CROWN
DISTRIBUTORS),

Plaintiff,

v.

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,

Defendants.

COMPLAINT

Plaintiff McKesson Corporation, which does business as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors in Florida ("McKesson"), for its complaint against the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation ("Division"), and the Office of the Comptroller, State of Florida ("Comptroller"), alleges:

PARTIES

1. At all relevant times, McKesson has been a distributor of domestic and imported alcoholic beverages at wholesale licensed by the Division pursuant to section 561.14, Florida Statutes (1985).

2. The Division, pursuant to Article IV, Section 6, Florida Constitution and section 20.16(2)(a), Florida Statutes (1985) is a part of the executive branch of state government. The Division, pursuant to sections 561.02, 561.07, 561.08, 561.11, and 562.17, Florida Statutes (1985) has the power and duty to supervise, collect, audit, and enforce the alcoholic beverage taxes imposed by Florida law.

3. The Comptroller is the constitutional officer authorized and directed by Article IV, Section 4(d), Florida Constitution, and section 215.26, Florida Statutes (1985) to administer the refund of monies paid into the State Treasury.

JURISDICTION

4. This Court has jurisdiction of this action, involving more than $5,000, pursuant to Article V, Sections 5(b) and 20(c)(3), Florida Constitution; Chapter 86 and section 215.26, Florida Statutes (1985); and Florida Rules of Civil Procedure 1.630.

INTRODUCTION

5. Before the Florida Legislature enacted Chapters 85-203 and 85-204, Laws of Florida, Florida's alcoholic beverage laws contained a statutory scheme that discriminated in favor of Florida manufacturers and distributors and Florida products in violation of the United States Constitution, Article I, Section 8, clause 3 (Commerce Clause); United States Constitution, Article I, Section 10, clause 2 (Import-Export Clause); United States Constitution, Amendment XIV, Section 1 (Equal Protection Clause); and Article I, Section 2 (Equal Protection Clause), Florida Constitution. The discriminatory provisions of Florida law were referred to by Florida legislators and officials as the "Florida Products Exemption".

6. Following the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida Legislature repealed the Florida Products Exemption. In its place, the Legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The Florida Legislature enacted the Revised Florida Products Exemption in light of Florida's preeminence in the manufacture of alcoholic beverages from certain agricultural products and in the production of certain agricultural products. Florida manufacturers are among the primary manufacturers of alcoholic beverages from citrus fruits, citrus byproducts, sugarcane, sugarcane byproducts, and varieties of the species *Vitus rotundifolia, Vitus aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitus shuttleworthii, Vitus munsoniani*, or *Vitus berlandieri* (the "Enumerated Grape Species"). Florida is the primary United States producer of citrus fruits and citrus byproducts. Only Florida, California, Texas, Arizona, Louisiana, and Hawaii producers grow citrus in commercially significant amounts in the United States. Florida is the primary United States producer of sugarcane and sugarcane byproducts. Only Florida, Hawaii, Louisiana, and Texas producers grow sugarcane in commercially significant amounts in the United States. Florida is the primary producer of the Enumerated Grape Species in the United States. Florida's producers grow only the Enumerated Grape Species for the production of wine.

7. The Revised Florida Products Exemption continues to discriminate in favor of Florida products and the manufacturers and distributors of such products. Accordingly, the Revised Florida Products Exemption violates the United States Constitution, Article I, Section 8, clause 3 (Commerce Clause); United States Constitution, Article I, Section 10, clause 2 (Import-Export Clause); United States Constitution Amendment, XIV, Section 1, (Equal Protection Clause); and Article I, Section 2 (Equal Protection Clause), Florida Constitution.

8. The Revised Florida Products Exemption is so vague, ambiguous, and uncertain as to be incapable of constitutional, non-

discriminatory application. Accordingly, the Revised Florida Products Exemption violates the United States Constitution, Amendment XIV, Section 1 (Due Process Clause), and Article I, Section 9 (Due Process Clause), Florida Constitution.

9. The Revised Florida Products Exemption requires state officials to inquire into the tax, economic, agricultural, and export laws and policies of foreign countries and attempts to affect such laws and policies. Accordingly, the Revised Florida Products Exemption involves the State of Florida in foreign affairs and international relations, matters which the United States Constitution entrusts solely to the Federal Government.

10. The Revised Florida Products Exemption requires McKesson to pay unconstitutional taxes on wine and wine coolers as follows:

10.1 Section 564.06(1), Florida Statutes (1985) imposes a tax of $2.25 per gallon on beverages, including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight. In contrast, to favor Florida manufacturers and products, section 564.06(2), Florida Statutes (1985) grants a discriminatory exemption from this tax for all wines, except natural sparkling wines, whole alcoholic content is manufactured exclusively from certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof. Further, section 564.06(2), Florida Statutes (1985) grants a discriminatory exemption for all other such beverages, except malt beverages, whose alcoholic content is manufactured exclusively from certain Florida products, *i.e.*, citrus fruits, the Enumerated Grape Species, citrus byproducts, sugarcane, sugarcane byproducts, or concentrates thereof.

10.2 Section 564.06(3), Florida Statutes (1985) imposes a tax of $3.00 per gallon on all wines, except natural sparkling wines, containing 14 percent or more alcohol by weight. In contrast, to favor Florida manufacturers and products, section 564.06(3), Florida Statutes (1985) grants a discriminatory exemption from this tax for all such wines whose alcoholic content is manufactured exclusively from

certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof.

10.3 Section 564.06(4) Florida Statutes (1985) imposes a tax of $3.50 per gallon on natural sparkling wines. In contrast, to favor Florida manufacturers and products, section 564.06(4), Florida Statutes (1985) grants a discriminatory exemption from this tax for natural sparkling wines whose alcoholic content is manufactured exclusively from certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof.

11. The revised Florida Products Exemption also requires McKesson to pay unconstitutional taxes on liquors as follows:

11.1 Section 565.12(1)(a), Florida Statutes (1985) imposes a tax of $6.50 per gallon on beverages containing 14 percent or more of alcohol by weight and not more than 48 percent, except wines. In contrast, to favor Florida manufacturers and products, section 565.12(1)(b), Florida Statutes (1985) sets a discriminatory, preferential tax rate of $4.35 per gallon for all such beverages whose distilled spirits are manufactured exclusively from certain products, *i.e.*, citrus products, citrus byproducts, sugarcane, or sugarcane byproducts.

11.2 Section 565.12(1)(b), Florida Statutes (1985) imposes a tax of $9.53 per gallon on beverages containing more than 48 percent alcohol by weight. In contrast, to favor Florida manufacturers and products, section 565.12(2)(b), Florida Statutes (1985) sets a discriminatory, preferential tax rate of $4.95 per gallon for all such beverages whose distilled spirits are manufactured exclusively from certain products, *i.e.*, citrus products, citrus byproducts, sugarcane, or sugarcane byproducts.

12. Florida's statutory scheme also contains provisions that assure that the benefits of the Florida Products Exemption are not available to the products of other states and countries ("Take-Back Provisions"). Specifically, sections 564.06(9)(a) to (c) and 565.12(c)(1) to (3),

Florida Statutes (1985) deny tax exemptions and preferences to the following:

a. Alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

b. Alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries;

c. Alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

13. Manufacturers seeking the tax exemptions and preferences authorized by sections 564.06 and 565.12, Florida Statutes (1985) for their products must apply to the Division between July 1 and July 31 of each year for a license. The Division has never granted such a license to any out-of-state manufacturer. The Division has granted licenses to Florida manufacturers, but only for alcoholic beverages made exclusively from Florida products.

14. Sections 564.06(12) and 565.12(10), Florida Statutes (1985) allow the State to police its unconstitutional discrimination in favor of Florida manufacturers and distributors and Florida products by requiring manufacturers who qualify for tax exemptions or preferences to report monthly on the source of raw materials for the manufacture of the products.

15. McKesson has been a distributor of, and has been required by sections 564.06 and 565.12, Florida Statutes (1985) to pay unconstitutional taxes on, alcoholic beverages. McKesson, which has protested the payment of the unconstitutional taxes, has been required

to and has paid such taxes whether or not McKesson has been paid by its customers. McKesson has not distribute [sic] any alcoholic beverage that has benefitted from a tax exemption or preference under the Revised Florida Products Exemption.

16. Pursuant to section 215.26, Florida Statutes (1985), McKesson is entitled to a refund of alcoholic beverage taxes paid pursuant to Florida's unconstitutional statutory scheme.

17. On or about June 9, 1986, McKesson timely filed with the Division, as agent for the Comptroller, a proper application of refund of taxes paid pursuant to sections 564.06 and 565.12, Florida Statutes (1985). By Notice of Intent to Render Decision, received by McKesson on August 13, 1986, the Comptroller announced the intention to deny McKesson's application for a refund.

18. The granting of refunds by the Comptroller upon application showing a right thereto is a ministerial function of the Office of the Comptroller.

19. McKesson, having made proper and timely application for the refund of alcoholic beverage taxes, which application shows McKesson's right thereto, is legally entitled to a refund. The Comptroller, having refused to grant the requested refund, has failed to perform a ministerial duty of his office.

20. There exists between McKesson and the Division a present and actual controversy concerning the constitutionality and enforceability of sections 564.06 and 565.12, Florida Statutes (1985). In addition, there exists between McKesson and the Comptroller a present and actual controversy concerning the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) and McKesson's right to a refund.

COUNT I
(United States Constitution, Commerce Clause)

21. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 20.

22. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against and burden interstate and foreign commerce and, thus, violate the United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause).

COUNT II
(United States Constitution, Import-Export Clause)

23. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 22.

24. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly lay imposts or duties on imports and, thus, violate the United States Constitution, Article I, Section 10, Clause 2 (Import-Export Clause).

COUNT III
(United States Constitution, Equal Protection Clause)

25. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 24.

26. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against McKesson and others and, thus, violate the United States Constitution, Amendment XIV, Section 1 (Equal Protection Clause).

COUNT IV
(United States Constitution, Due Process Clause)

27. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 26.

28. Sections 564.06 and 565.12, Florida Statutes (1985) are impermissibly vague, ambiguous, and uncertain and, thus violate the United States Constitution, Amendment XIV, Section 1 (Due Process Clause).

COUNT V
(United States Constitution, Foreign Affairs)

29. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 28.

30. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly involve the State of Florida in foreign affairs and international relations and, thus, violate the United States Constitution.

COUNT VI
(Florida Constitution, Equal Protection Clause)

31. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 30.

32. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against McKesson and others and, thus, violate Article I, Section 2 (Equal Protection Clause), Florida Constitution.

COUNT VII
(Florida Constitution, Due Process Clause)

33. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 32.

34. Section 564.06 and 565.12, Florida Statutes (1985) are impermissibly vague, ambiguous and uncertain and, thus, violate Article I, Section 9 (Due Process Clause), Florida Constitution.

PRAYER

WHEREFORE, McKesson prays that this court enter orders:

(a) Declaring that sections 564.06 and 565.12, Florida Statutes (1985) violate the United States and Florida Constitutions and, accordingly, are void and unenforceable;

(b) Declaring McKesson to be entitled to a refund of alcoholic beverage taxes as set forth above, together with interest;

(c) Issuing an injunction preventing the Division from enforcing sections 564.06 and 565.12, Florida Statutes (1985); and

(d) Issuing an injunction or writ of mandamus compelling the Comptroller to grant a refund to McKesson of alcoholic beverage taxes as set forth above, together with interest, and

(e) Awarding McKesson such other and further relief, such as reasonable attorney's fees and costs of suit, as the Court may deem proper.

Dated: September 3, 1986

/s/ Martha W. Barnett
Martha W. Barnett
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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE No. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

ANSWER

COME NOW Defendants, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA and answer the Complaint in this cause and say:

FIRST DEFENSE

This Court lacks jurisdiction over the subject matter of the action.

The provisions of § 564.06 and § 565.12, *Fla. Stat.* (1985) which grant the partial tax exemption and which establish a separate tax rate for exempted products were enacted as an inseparable unit. Those provisions are severable from the provisions of the statute which impose the tax. Therefore, Plaintiff lacks the requisite personal stake as a taxpayer to confer standing upon it to challenge the statutes.

Plaintiff does not allege competitive injury as a distributor by reason of the existence of the exemptions. Plaintiff is not a manufacturer of alcoholic beverages. Plaintiff therefore lacks standing to challenge the statutes.

SECOND DEFENSE

The taxes for which Plaintiff seeks refunds were included by Plaintiff in the sales prices charged by Plaintiff to licensed retail vendors for alcoholic beverages sold by Plaintiff to such vendors.

Such taxes were included in the sales prices charged for alcoholic beverages distributed by Plaintiff in addition to all other taxes, costs and overhead expenses incurred by Plaintiff with regard to the sale of Plaintiff's products, and in addition to the margin of profit included by Plaintiff in the sales prices of its products. Plaintiff did not bear the financial burden of the tax and lacks standing to seek a refund.

Therefore, this Court lacks subject matter jurisdiction over the subject matter of the action.

THIRD DEFENSE

Plaintiff has failed to join certain parties whose presence before the Court is indispensable to Plaintiff's cause of action and whose interests would be adversely affected by the relief which Plaintiff seeks, to wit: Those persons or corporations presently holding licenses granting reduced tax rates for alcoholic beverage products under Sections 564.06 and 565.12, *Fla. Stat.* (1985). Those persons or corporations - Todhunter International, Inc.; Fruit Wines of Florida, Inc.; Jacquin-Florida Distilling Company; and Lafayette Vineyards and Winery, Ltd.- are within the jurisdiction of the Court. Their joinder is indispensable to do complete justice and equity, inasmuch as a declaration that Sections 564.06 and 565.12, *Fla. Stat.*, are unconstitutional and an injunction against the present Defendants to prevent enforcement of the terms of those statutes would effect the interests and rights of those corporations regarding their existing licenses to manufacture alcoholic beverages granted exemption or partial exemption.

In further answer, Defendants respond to each correspondingly numbered paragraph of the Complaint and say:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied.

5. Without knowledge.

6. Defendants admit the allegations of the first and second sentence, except that the phrase "Revised Florida Products Exemption" is specifically denied. The Defendants are without knowledge of the remainder of the allegations of said paragraph.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

10.1 Defendants admit that § 564.06(1) imposes a tax of $2.25 per gallon on beverages, including wines (except natural sparkling wines) and malt beverages, containing more than 1% alcohol by weight and less than 14% alcohol by weight and admit that § 564.06(2) provides for an exemption for products there enumerated. The remainder of the allegations of that paragraph are denied.

10.2 Defendants admit that a tax of $3.00 per gallon is imposed on wines containing 14% or more alcohol by weight in § 564.06(3) and that said section provides an exemption from the tax for the products enumerated therein. Otherwise, the allegations of that paragraph are denied.

10.3 Defendants admit that § 564.06(3) imposes a tax on natural sparkling wines of $3.50 per gallon and that said section grants an exemption to products enumerated therein. Otherwise, the allegations of that paragraph are denied.

11. Denied.

11.1 Defendants admit that § 565.12(1)(a) imposes a tax of $6.50 per gallon on alcoholic beverages, except wines, containing 14% or more alcohol by weight and not more than 48% alcohol by weight and that §565.12(1)(b) provides a lower tax rate for products there enumerated. Otherwise, the allegations of that paragraph are denied.

11.2 Defendants admit that §565.12(2)(a) imposes a tax of $9.53 per gallon on beverages containing more than 48% alcohol by weight and that §565.12(2)(b) provides a lower tax rate on products there enumerated. Otherwise, the allegations of that paragraph are denied.

12. Defendants admit that §564.06(9)(a)-(c), and 565.12(1)(c), (2)(c) were enacted and read as alleged. Otherwise, the allegations of that paragraph are denied.

13. Defendants admit that new applicants must apply between July 1 and July 31 and that entities previously granted a license under said statutes must annually seek renewal between those dates. Defendants admit that no license has been granted to an out-of-state manufacturer. Defendants deny the remaining allegations of that paragraph.

14. Defendants admit that §564.06(12) and § 565.12(10) were enacted and speak for themselves. Otherwise, the allegations of that paragraph are denied.

15. Defendants admit that McKesson is a distributor and has been required to pay taxes under §§ 564.06 and 565.12, *Fla. Stat.* Defendants deny that McKesson has protested payment of taxes under §§ 564.06 and 565.12, *Fla. Stat.* (1985). Defendants admit that McKesson is responsible for the taxes due whether or not it has been paid by its customers, but Defendants are without knowledge as to whether McKesson has remitted taxes for which it has not [been] reimbursed by its customers. Defendants are without knowledge as to the remaining allegations of that paragraph.

16. Denied.

17. Admitted.

18. Denied.

19. Denied.

20. Denied.

21. Defendants incorporate their answers to paragraphs 1-20.

22. Denied.

23. Defendants incorporate their answers to paragraphs 1-20.

24. Denied.

25. Defendants incorporate their answers to paragraphs 1-20.

26. Denied.

27. Defendants incorporate their answers to paragraphs 1-20.

28. Denied.

29. Defendants incorporate their answers to paragraphs 1-20.

30. Denied.

31. Defendants incorporate their answers to paragraphs 1-20.

32. Denied.

33. Defendants incorporate their answers to paragraphs 1-20.

34. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The provisions of §564.06(2), (3), (4), (9), and (10), *Fla. Stat.* (1985) were enacted as an inseparable unit. Said subsections are severable from the remaining provisions of §564.06, *Fla. Stat.* (1985).

SECOND AFFIRMATIVE DEFENSE

The provisions of §565.12(1)(b); (c); (2)(b), (c); (5) and (6), *Fla. Stat.* (1985) were enacted as an inseparable unit. Said subsections are severable from the remaining provisions of §565.12, *Fla. Stat.* (1985).

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904/487-2142

COUNSEL FOR DEFENDANTS

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST FOR ADMISSIONS

The Defendants hereby request Plaintiff to admit the following:

DEFINITIONS

"Wines" refers to those items of alcoholic beverage upon which an excise tax is imposed by § 564.06, Florida Statutes.

"Liquors" refers to those items of alcoholic beverage upon which an excise tax is imposed by § 565.12, Florida Statutes.

"You" refers to Plaintiff in this action and its employees and authorized agents.

"Refund period" refers to the period from and after July 1, 1985 for which you are seeking refund of excise taxes paid pursuant to §§ 564.06 and 565.12, Florida Statutes (1985).

"Customers" refers to retail vendors and excludes military vendors and other wholesale distributors.

REQUESTS FOR ADMISSION

With reference to the above-defined terms, Defendants request that you admit the truth of the following facts and matters:

1. That during 1981 you distributed and sold 24,031.94 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981 - 1984 Supp.)

2. That during 1982 you distributed and sold 6,956.52 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 562.12, *Fla. Stat.* (1981 - 1984 Supp.)

3. That during 1981 you distributed and sold 705 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981 - 1984 Supp.)

4. That during 1982 you distributed and sold 321.45 gallons of wine which were exempt or partially exempt form Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981 - 1984 Supp.)

5. That during the refund period the taxes for which you seek a refund were included in the sales prices charged by you for wines and liquors sold by you to licensed retail vendors, in addition to all other taxes, costs, and overhead expenses incurred by you with regard to the sale of those products, and in addition to the profit included by you in the sales price of those products.

6. For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period the taxes for which you seek a refund were included in the sales prices charged for each such unit of product and were included in such prices in addition to all other taxes, costs, overhead expenses incurred by you with respect to the sale of such units of product, and in addition to the profit included by you in the sales prices for such units of product.

7. For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period, the taxes for which you seek a refund became part of the debt due from the retail vendors to you and, upon delivery of the products, were collectible as any other debt due to you.

(a) That you have been fully paid for all units of wine and liquor products which you distributed to your customers during the refund period to and including September 6, 1986.

8. During the refund period, you were not licensed as a manufacturer of alcoholic beverages in Florida or elsewhere and did not operate as such.

9. During the refund period if a manufacturer's product in which you dealt as a distributor was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985), such exemption was available for your benefit equally as compared with other distributors who dealt in the same product.

10. During the refund period, if a manufacturer's product in which you dealt as a distributor was not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985) all distributors dealing in such product paid the full excise tax imposed.

11. During the refund period, you paid beverage excise taxes on wines and liquors in which you dealt, which products were not exempt or partially exempt from the tax, without protesting to Defendants or the State of Florida the payment of the tax, without voicing question to Defendants or to the State regarding constitutionality of the provisions of § 564.06 and § 565.12, *Fla. Stat* (1985), and without advising Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

12. During the refund period, you were aware that the beverage excise taxes paid on wines and liquors which were not exempt or partially exempt from the tax would be appropriated and expended for governmental operations and programs.

13. The taxes paid during the refund period until June 30, 1986 have been appropriated and expended for governmental operations and programs.

14. That during the refund period you were approached by Jacquin-Florida Distilling Co. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

15. That you declined the offer referred to in paragraph 14.

16. That during the refund period you were approached by Lafayette Vineyards & Winery, Ltd. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

17. That you declined the offer referred to in paragraph 16.

18. That during the refund period you were approached by Todhunter International, Inc. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.*, (1985) or both.

19. That you declined the offer referred to in paragraph 18.

20. That prior to January, 1985, you voluntarily withdrew from the distribution of products which qualified for the exemptions provided in §§ 564.06 and 565.12, *Fla. Stat.* (1981 - 1984 Supp.).

21. That you were offered by Todhunter International, Inc., Jacquin-Florida Distilling Co., or Lafayette Vineyards & Winery, Ltd., or all of them, the opportunity to distribute their products which

qualified for exemption or partial exemption from the beverage excise tax under §§ 564.06 and 565.12, *Fla. Stat* (1981 - 1984 Supp.).

22. That you declined the offer or offers referred to in paragraph

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, Florida 32399-1050
904/487-2142
ATTORNEY FOR
DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE No. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS

Defendants' hereby request Plaintiff to produce the following documents for inspection and copying at Room 210, Montgomery Building, Koger Executive Center, Apalachee Parkway, Tallahassee, Florida, or at a location of Plaintiff's choosing convenient to the inspection and copying thereof:

1. All documents identified in response to Defendant's First Interrogatories.

2. All memoranda, reports, written recommendations, and written directions to or by the person or persons responsible for pricing deciisons [sic] with regard to wine and liquor sold by you during the time period January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984, which documents address the pricing of such wine and liquor sold by you during those time periods.

3. All documents which constitute, reflect, or refer to pricing calculations or work sheets with respect to wine and liquors sold by you for the periods of January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984.

4. All sales invoices for wine and liquor sold by you during the months of May - August, 1977 and during the months of July - October, 1983.

5. All memoranda and other documents in your possession, other than those prepared in anticipation of this litigation, which discuss or refer to the constitutionality or unconstitutionality or the legality or illegality of the excise tax imposed on wine and liquor by §§564.06 and 565.12, *Fla. Stat.*, and the exemption provided by those statutes to wine and liquor products produced from Florida-grown products and bottled in Florida.

6. The minutes of all meetings of your board of directors from January 1, 1977 to date.

7. All reports to stockholders from January 1, 1977 to date.

8. All records pertaining to stockholders' meetings held since January 1, 1977.

9. All notices of protest delivered to Defendants or to the State of Florida by you on your behalf regarding payment of beverage excise taxes from January 1, 1980 to date.

10. All written communication from and after January 1, 1980 between you and Todhunter International, Inc.; Jacquin-Florida Distilling Compnay [sic] or Lafayette Vineyards & Winery, Ltd.;or all

of them; regarding your distribution or possible distribution of their wines and liquors.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, Florida 32399-1050
904/487-2142

ATTORNEY FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

Plaintiff McKesson Corporation ("McKesson"), by and through its attorneys, hereby moves this Honorable Court as follows:

1. That the Court, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, enter partial summary judgment in favor of Plaintiff McKesson declaring that sections 564.06 and 565.12, Florida Statutes (1985) violate the United States Constitution and, accordingly, are unenforceable and void. In support of this motion, McKesson avers that, since no genuine issue as to any material fact exists, McKesson is entitled to a judgment as a matter of law.

2. That the Court, pursuant to Rule 1.610 of the Florida Rules of Civil Procedure and this Court's equitable power, enter a preliminary injunction enjoining Defendant Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, from enforcing sections 564.06 and 565.12, Florida Statutes (1985).

3. That the Court grant such other and further relief as the Court may deem proper.

McKesson moves the Court pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and pursuant to Rule 1.610 of the Florida Rules of Civil Procedure and this Court's equitable power and bases the motions: upon this motion, the memorandum in support of the

motion, the affidavits in support of the motion, and all the other pleadings, papers, and documents on file; upon this Court's judicial notice of official actions of Florida legislative and executive departments; and upon any oral arguments to the Court at the hearing on the motions.

Wherefore, McKesson Corporation respectfully prays that the Court enter the requested orders.

Dated: October 16, 1986.

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM
IN SUPPORT OF ITS MOTIONS FOR
PARTIAL SUMMARY JUDGEMENT AND FOR A PRELIMINARY
INJUNCTION

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.....McKesson's Appendix

Plaintiff McKesson Corporation ("McKesson") submits this memorandum in support of its motions for partial summary judgment and for a preliminary injunction.

McKesson asks this Court to determine that sections 564.06 and 565.12, Florida Statutes (1985) are unconstitutional under the federal Constitution.

INTRODUCTION

McKesson does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors. (Collins' Affidavit, ¶ 3.) McKesson, which is licensed by the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, under section 561.14, Florida Statutes (1985), has distributed domestic and imported alcoholic beverages at wholesale and has paid excise taxes on alcoholic beverages under sections 564.06 and 565.12, Florida Statutes (1985). (Collins' Affidavit, ¶¶ 3 and 4.)

On September 3, 1986, McKesson filed a Complaint in the Circuit Court, Second Judicial Circuit, Leon County, challenging Florida's alcoholic beverage tax as unconstitutional under the federal and state constitutions. McKesson's Complaint raises a challenge very similar to Tampa Crown and Florida Beverage's Complaint in the Circuit Court in Case No. 86-773. All three corporations, which are Florida distributors, assert that Florida in 1985 enacted an unconstitutional tax.

McKesson, which has standing to challenge the constitutionality of the Revised Florida Products Exemption, asks this Court to grant its

motions for partial summary judgment and for a preliminary injunction on the basis of the following federal constitutional issues:

First, sections 564.06 and 565.12, Florida statutes (1985), impermissibly discriminate against interstate and foreign commerce and, thus, violate the United States Constitution's Commerce Clause. The Florida legislature intentionally designed the Florida statutes to continue Florida's historic tax policies of protecting Florida products and industry, and the statutes effectively discriminate against commerce among the states and with foreign nations.

Second, the sections impermissibly involve Florida in foreign affairs and international relations and, thus, violate the United States Constitution. The Florida statutes disrupt the federal government's exclusive jurisdiction over the regulation of foreign affairs by, in general, requiring Florida to make determinations concerning other countries' activities and, in specific, permitting Florida to obstruct various federal programs.

Third, the sections impermissibly discriminate against foreign imports and, thus, violate the United States Constitution's Import-Export Clause. The Florida statutes effectively impose a duty upon imports.

THE REVISED FLORIDA PRODUCTS EXEMPTION

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws contained a statutory scheme that granted an excise tax exemption to beverages manufactured and bottled in Florida from Florida products. The similarity between the Florida law, Florida Statutes sections 564.06 and 565.12 (Supp. 1984) ("Florida Products Exemption"), and the Hawaii law struck down in *Bacchus* prompted the Florida legislature to alter the language of the statute.

During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The legislature removed the word "Florida" from the sections and substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to a tax break. The sections, one applying to wines, section 564.06, and one applying to distilled spirits, section 565.12, divide into three relevant parts.

First, the sections impose a per gallon tax on the alcoholic beverages, which varies according to the percentage of alcohol by weight.

Second, the sections provide a tax exemption for wines and a tax preference reduction for distilled spirits when the alcoholic content of the beverages is manufactured exclusively from certain designated products. The Florida statutes' designated products are all Florida products. Florida, which cannot produce the grape species that grape producers throughout the world generally produce for the manufacture of wine and wine coolers, *Vitis Vinifera*, has included among its designated grape species the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia*, *Vitis Aestivalis ssp. Simpsoni*, *Vitis Aestivalis ssp. Smalliana*, *Vitis Shuttleworthii*, *Vitis Munsoniana*, and *Vitis Berlandieri*). (Olmo's Affidavit, ¶¶ 3 and 4.) Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, has included citrus fruits, citrus products, and citrus byproducts among the designated products. (Peck's Affidavit, ¶ 4.) Florida, which is also one of the few states to produce sugarcane and is the leader in the production of sugarcane, has included sugarcane and sugarcane byproducts among the designated products. (Peck's Affidavit, ¶ 5.)

Third, the sections establish a set of provisions which take back the tax exemption or tax reduction under certain circumstances ("Take Back Provisions"). The tax breaks are not granted to the following:

(a) Alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) Alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) Alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Sections 564.06 and 565.12, Florida Statutes (1985).

Under the 1985 statutory scheme and the rules of the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the Division reviews the laws and programs of the applicant's home state or country to determine whether any of the above conditions apply. Manufacturers seeking the tax breaks must apply to the Division between July 1 and July 31 of each year. Under sections 564.06(12) and 565.12(10), manufacturers who receive the tax breaks must report monthly on the source of raw materials for the manufacture of the products.

I. McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax

upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

The Florida Supreme Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), adopted an expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. The Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under the decisions in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), McKesson plainly has standing to challenge the constitutionality of the Florida statutes in this Court. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (Collins' Affidavit, ¶¶ 3 and 4.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor, has paid the excise taxes on its products to the State whether its customers have paid for products or not. (Collins' Affidavit, ¶ 4.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (Collins' Affidavit, ¶¶ 7 and 8.) As a result, McKesson has suffered economic losses. (Collins' Affidavit, ¶ 9.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.[1]

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[1] Florida cannot argue that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), rejected a similar standing argument suggested by the dissent.

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

The Commerce Clause[2] enforces our overriding national interest in free, unrestricted trade among the states through a national common market. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977). The Commerce Clause federalizes regulation of foreign and interstate commerce and restricts internecine actions among the states. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949). Thus, each state cannot "'legislate according to its estimate of its own interests [and] the importance of its own products.'" *Id.* at 533 (quoting Story, *The Constitution*, §§ 259, 260).

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Where state legislation advancing legitimate local interests affects interstate commerce only incidentally and employs the least burdensome alternative, the Court will permit the legislation. *Id.*

The Revised Florida Products Exemption's scheme of tax exemptions and preferences fails on both levels of constitutional analysis. The State has sought to protect its local commerce at the expense of interstate competition. In so doing, the State offends the cardinal rule of Commerce Clause jurisprudence that no state may erect a tax scheme that provides a direct commercial advantage to local business by discriminating against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). The Commerce Clause does not allow Florida to advance its parochial interests at our national economy's expense.

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[2] The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ."

A. The Revised Florida Products Exemption Constitutes Economic Protectionism and, Therefore, Is Unconstitutional.

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270. The "evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626. The Florida legislation is demonstrably protectionist and discriminatory in both its purpose and its effect.

1. The Florida Legislature Designed the Florida Law to Protect Florida Commerce from Interstate Competition.

The Florida legislature, intending to protect certain Florida agricultural products, and to protect the manufacturers using those products, enacted the Revised Florida Products Exemption. From among the legion of agricultural products used for the making of wines and distilled spirits, the legislature decided to favor citrus, sugarcane, and certain species of grapes by granting these products a commercial advantage in the market. In its selectivity, the legislature knew that only Florida and a few other states produce the favored agricultural products in commercial quantities. The legislature then attached the Take Back Provisions to ensure that Florida could deny the tax breaks to products from the few other states that do in fact produce the favored agricultural products.

This Court's review of the Florida statutes' legislative history will reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism.[3] Two dominant themes emerge from the legislative history.

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[3] When the lawmakers' purposes in enacting a statute appear in the legislative history, the Supreme Court has focused on that history to identify the legislative intent. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds). *See also Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" may show the discriminatory purpose).

Florida courts have also reviewed legislative history to ascertain the legislature's purpose. *See, e.g., E.M. Watkins & Co. v. Board of Regents*, 414 So. 2d 583, 587 (Fla. Dist. Ct. App. 1982) (legislative committee hearings are "strongly indicative of the legislative intent in enacting [a] statute"); *Speights v. Florida*, 414 So. 2d 574, 576 (Fla. Dist. Ct. App. 1982) (tracing the legislative history of an act is relevant in discerning the legislative intent).

First, the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption, which unconstitutionally discriminated in favor of Florida manufacturers and distributors and Florida products.

Representative Jones, a sponsor of the new legislation, explained the purpose behind the Revised Florida Products Exemption during testimony before three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

> The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(McKesson's Appendix, Exhibit A, at 1.) Before the House Committee on Appropriations, Mr. Jones stated: "What we're doing here is to retain those 300 jobs that have been developed in Florida as

a result of our policies towards Florida products." (McKesson's Appendix, Exhibit C, at 1.) Representative Hargrett, a co-sponsor of the legislation, testified before the same Committee:

> Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic.] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

Id. at 3. During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." *Id.* at 4. Before the House Committee on Finance and Taxation, Mr. Jones stated:

> I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .
>
> With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(McKesson's Appendix, Exhibit B, at 1-4.)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

> Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .

> It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(McKesson's Appendix, Exhibit D, at 1.) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (McKesson's Appendix, Exhibit E, at 1.)

On the House floor, during the May 28, 1985 debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." (McKesson's Appendix, Exhibit 6, at 2.) Mr. Jones explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." *Id.* at 2-3. During the House floor debates on May 28, 1985 and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (McKesson's Appendix, Exhibit G, at 1-10.) [4]

Second, the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), by continuing to favor Florida commerce. During the the Senate Commerce Committee deliberations, the Chairman responded to another senator's concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane:

> [t]he reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the

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[4] Florida's executive department records demonstrate that the Governor's office recognized the legislative intent of the revised law to preserve the protectionist purpose of the former law. (McKesson's Appendix, Exhibit H and Exhibit I.)

> Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important.

(McKesson's Appendix, Exhibit D, at 11.) The Senator added --

> [w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

Id. at 13. Immediately before the Senate Committee voted to adopt the bill, Senator McPherson concluded:

> [t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

Id. at 14.

During the Florida Senate Finance and Taxation Committee meeting on May 14, 1985, Senator Grant objected that the sponsors of the Revised Florida Products Exemption intended to maintain the protection of the Florida alcoholic beverage industry but would not continue to protect the Florida gasohol industry, and argued that the legislature should link the protection of both industries.

> Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of jobs, the continuation of use of Florida products without saying so because that was a constitutional issue . . . I wonder why we want to continue one exemption and remove another.

(McKesson's Appendix, Exhibit E, at 2-3.) Senator Crawford, in response, explained that the sponsors had found disagreement among Florida producers regarding how the legislature should proceed with gasohol legislation, but no such disagreement among Florida producers regarding how the legislature should proceed with alcoholic beverage legislation. *Id.* at 3. Senator McPherson then added this candid observation:

> I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

Id. at 4.

As the legislative history strikingly demonstrates, the legislature altered the former Florida Products Exemption but maintained the protectionist purpose and effect in the new law.

2. The Florida Law Effectively Protects Florida Commerce from Interstate and Foreign Competition

Florida's producers and other states' and countries' producers compete for sales to manufacturers of alcoholic beverages. With respect to wine and wine coolers, Florida's producers, who cannot grow the species that most consumers prefer, *Vinifera*, but can grow the Florida species, compete with other states' and countries' producers, who can grow the *Vinifera* species. (Olmo's Affidavit, ¶¶ 2-5.) With respect to liquor, Florida's producers of citrus and sugarcane compete with other states' and countries' producers, who frequently cannot grow citrus or sugarcane but can grow alternative crops. (Peck's Affidavit, ¶¶ 3-13.)

The Revised Florida Products Exemption favors Florida's producers in the competition in interstate and foreign markets and prevents other states' and countries' producers from competing on

equal terms. With respect to wine and wine coolers, the Florida statute counters Florida's inability to produce the preferred *Vinifera* species and other states' and countries' ability to produce the preferred favored species by providing tax exemptions only for species which Florida can produce. (Olmo's Affidavit, ¶¶ 2-5.) With respect to liquor, the Florida statute builds on Florida's historic preeminence in the production of citrus and sugarcane and many other states' and countries' inability to produce citrus and sugarcane by providing tax preferences only for citrus and sugarcane. (Peck's Affidavit, ¶¶ 3-13.)

In other words, Florida has decreed that its grape, citrus, and sugarcane producers shall have a commercial advantage over certain other states' and countries' producers in the competition for sales to the manufacturers of alcoholic beverages. Thus, the manufacturers who use the Florida law's favored products obtain a commercial advantage from their lowered cost as a result of the tax breaks. (Peck's Affidavit, ¶¶ 3-13.) Such anticompetitive protectionism clashes with "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, Inc.* 424 U.S. 366, 380 (1976).

The Supreme Court has invoked the Commerce Clause to restrict the means by which a state can constitutionally seek to promote its own industry. The Court has repeatedly applied Justice Cardozo's formulation of the rule:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935). Recently, the Supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), applied the rule to a state's attempt to favor local interests with respect to the manufacture of alcoholic beverages. The Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), summarized the *Bacchus* holding:

> Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271, (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*Id.* at 278].

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court found that a city regulation, which on its face purported to advance health and safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), stated the basic rule:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 455-56. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981) (Court must focus on state tax provisions' "practical effect"); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (Court must assess state tax "in light of its actual effect"); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

The Florida Supreme Court has recognized the United States Supreme Court's approach. For example, in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. The Court recognized that the statute's practical effect was the focus of inquiry. *Id.* at 320.

The Revised Florida Products Exemption, which establishes a preferential trade area for the designated products, offends the Commerce Clause through its practical effect. This Court easily can construct examples of the Florida Law's unconstitutional practical effect. Three illustrations will suffice:

(1) A winemaker who uses a species of grape that does not grow in Florida incurs higher taxes than a winemaker who uses Florida grapes;

(2) A vodka manufacturer who uses Maine potatoes or Swedish grain incurs higher taxes than a vodka manufacturer who uses Florida citrus;

(3) A brandy distiller must use a prime Florida agricultural product, sugarcane, instead of Michigan's or Barbados' beet sugar to qualify for the economic advantage.

Thus, the Florida act disadvantages the interstate movement of other states' agricultural products that do not receive the Florida tax break and that compete in the Florida market with the Florida-favored products. (Peck's Affidavit, ¶¶ 3-13.) The United States district court in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), declared unconstitutional an Ohio statute imposing taxes on coal whose practical effect resembled the Florida law's effect. The Ohio legislature did not expressly restrict tax advantages to Ohio coal, but subjected high-sulfur coal to a lower tax rate than low-sulfur coal. The vast bulk of Ohio's coal production was of the high-sulfur grade. The court found that the tax scheme disadvantaged the interstate movement of low-sulfur coal and thereby constituted a *prima facie* violation of the Commerce Clause. The court observed: "[s]urely a competent purchasing agent of a steam-electricity generating utility would consider this . . . price differential when deciding whether to purchase Ohio high-sulfur coal or Kentucky low-sulfur coal." *Id.* at 408.

Moreover, the discriminatory Florida tax act divests the out-of-state growers of any competitive advantages they would otherwise have and

confers advantages on local growers. Florida, which cannot grow *Vitis Vinifera*, the grape species that consumers usually prefer, has decided to subsidize the grape species it can produce. (Olmo's Affidavit, ¶¶ 2-5.) Florida, whose predominant products face competition for markets from other states' products, has attempted to affect many other states' ability to compete. (Peck's Affidavit, ¶ 6 and 9.)

The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. *Id.* at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 352. The Florida tax scheme exhibits the same defect.

Under the Commerce Clause, Florida cannot pass a law decreeing that products from Florida and a few other states will be taxed at one rate and products from the remaining states will be taxed at a higher rate. The Revised Florida Products Exemption has the same practical effect. As the court stated in *Mapco, Inc. v. Grunder*, where in practical operation a state's statute favors its own products, it "is no less invalid because it is not cast in terms of location. The commerce clause forbids both forthright and insidious discrimination." 470 F. Supp. at 410 n.14.

The Florida law's Take Back Provisions further discriminate against interstate commerce. The provisions prevent out-of-state manufacturers and distributors who do in fact use the Florida-favored products from receiving the tax breaks. The law grants the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the discretion to determine whether the state, territory, or country in which the alcoholic beverage is manufactured or bottled:

(1) "discriminates" against alcoholic beverages manufactured or bottled outside of its boundaries;

(2) provides "economic incentives or advantages" exclusively for alcoholic beverages produced within its boundaries; or

(3) provides "export subsidies" for agricultural products used in making the alcoholic beverages. Upon an affirmative finding by the Florida agency with respect to any of the above conditions, Florida withholds the tax breaks.

Far from fostering a "level playing field" for interstate commerce, the Revised Florida Products Exemption's vague, ambiguous provisions force out-of-state dealers (who use the Florida-favored products to avoid the statutes initial competitive barrier) to enter a minefield resulting from Florida's interpretation of laws or programs.[5] Under the law, for example, if Florida determines that California provides "export subsidies" for agricultural products used in making alcoholic beverages, then a California manufacturer of wine from oranges would not receive the tax advantages. However, if Florida determines that Oregon does not "discriminate" against alcoholic beverages, an Oregon manufacturer using those same California oranges would receive the tax exemption. Indeed, given the statutes' vague language, the only safe haven for a firm wishing to compete on equal terms in Florida is to move to Florida.

The legislature may have been far too clever in designing the Take Back Provisions to prevent out-of-state producers from competing on even terms in Florida. Predictably, Florida has not turned the Florida statutes against local interests by ruling that the law, itself, constitutes Florida discrimination and, therefore, that Florida firms do not qualify for the tax exemption. But, certainly, New York might construe the Florida law as discriminatory, warranting reciprocal discrimination

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[5] The Supreme Court has stated that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2086 n.5 (1986).

against Florida firms. Expanding the scenario, each state might allow its agencies to scrutinize other states' laws and, upon a finding of discrimination, authorize discrimination in turn against the offending state. This is the very kind of commercial warfare the Commerce Clause was designed to prevent. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949).

Florida cannot save its discriminatory law with the assertion that the law actually promotes free interstate commerce. Florida stands the Commerce Clause on its head by assuming that it authorizes a state to erect trade barriers in response to trade barriers.

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), in which a Louisiana milk producer challenged a Mississippi regulation requiring certain trade reciprocity, the Supreme Court considered similar reasoning. The Court rejected Mississippi's argument that its reciprocity requirement encouraged free trade among states by forcing a state that had been protecting its own producers to eliminate trade barriers. Where a state unconstitutionally burdens interstate commerce by protecting its own producers from competition, "the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 380.

Similarly in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), a challenge to Nebraska's reciprocity requirement for the interstate transportation of ground water, the Court held that the reciprocity provision erected an impermissible barrier to interstate commerce and could not survive the "strictest scrutiny" reserved for discriminatory legislation. *Id.* at 957—58. Furthermore, the Court noted, citing *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, "[t]he reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958 n.18.

In an action challenging reciprocal truck taxes, the Supreme Judicial Court of Maine applied *Cottrell* to find unconstitutional a state tax scheme that "had as its candid purpose coercive retaliation to force the 13 'offending' states to drop the extra tax burdens they impose on Maine trucks." *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986). To the extent, if any, that the other states were unconstitutionally burdening interstate commerce, the Court held that the Commerce Clause itself provided the constitutional remedy. "A state may not violate the Commerce Clause in an attempt through self – help to coerce another state into desisting from a Commerce Clause violation." *Id.*

Interestingly, Florida rejected Canandaigua Wine Company's application for the tax exemption after determining that New York, Canandaigua's home state, discriminated in favor of New York wine products. The particular New York legislation faced a challenge in court on constitutional grounds. In *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y. 1985), *aff'd and modified*, 761 F.2d 140 (2d Cir. 1985), the court applied the Commerce Clause to find that the New York Alcoholic Beverage Control Law, intended to aid the New York grape industry, constituted unconstitutional economic protectionism. *Loretto Winery* underscores the point made by the Supreme Court in *Cottrell*: the Commerce Clause, in lieu of a retaliatory free-for-all among the states, provides the constitutional means for challenging protectionist state legislation.

The State cannot support its retaliatory provisions by citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), or *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). Both inapposite cases, which involved the insurance industry, were expressly decided on Equal Protection Clause grounds.[6] Judicial scrutiny under the Commerce

[6] "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act [15 U.S.C.A. §§ 1011 through 1015 (West 1976)]." *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 653.

Clause is more exacting than under the Equal Protection Clause. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869. The Florida Supreme Court in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), reaffirmed this Commerce Clause rule. The Court determined that a lower court's reliance on a particular case was "misplaced because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case." *Id.* at 321.

Moreover, unlike the Florida Take Back Provisions, California's retaliatory tax scheme in *Western & Southern Life Insurance Co. v. State Board of Equalization* was precisely proportional. *See* 451 U.S. at 650-51. Under the Florida provisions, the state agency makes no attempt to calibrate any manufacturer's perceived advantage before denying the substantial commercial advantage conferred by the Florida law. The most trivial "economic incentive" provided by an out-of-state firm's home state might preclude the firm's receipt of the Florida tax break, whether the particular firm ever benefited from the incentive or not.

The Revised Florida Products Exemption, on its face, discriminates against interstate commerce. Florida has sought a shortsighted parochial advantage at the expense of the national common market. The law's protectionist purpose coincides with its practical effect. Both the purpose and the effect make the statutes unconstitutional.

B. The Revised Florida Products Exemption Imposes an Unconstitutional Burden on Interstate Commerce.

If the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, Florida's alcoholic beverage tax scheme still would violate the Commerce Clause because it places an excessive burden on interstate commerce. The Commerce Clause requires this Court not only to determine whether the law is protectionist in purpose or effect, but also to inquire:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and, if so,

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). *See also Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).[7] The Florida Revised Products Exemption fails to satisfy even one of these requirements for constitutionality.

1. The Florida Tax Neither Regulates Even-Handedly nor Creates only Incidental Effects on Interstate Commerce.

As discussed above, Florida's taxing scheme is not evenhanded. Florida grants a tax exemption or preference to certain agricultural products and selects the products for no reason other than the fact of their cultivation in Florida. In this way, the burden of the Florida tax – far from being evenhanded – falls on those distributors who, lacking tax advantages, must sell higher-priced, non-Florida goods and suffer a corresponding loss of sales. (Peck's Affidavit, ¶¶ 3-13.)

The Florida tax's effects on interstate commerce are not "incidental." Florida's tax law does not directly affect only local goods and, thus, only incidentally affect interstate commerce when those goods are sold. Rather, Florida's purposefully limited tax scheme seeks to favor Florida products and to disfavor foreign

[7] The Supreme Court's formulation of this test in *Pike v. Bruce Church*, 397 U.S. 137 (1970), makes even more clear that even a non-protectionist state statute may be unconstitutional if it creates excessive burdens on interstate commerce: "[w]here the statute regulates evenhandedly to effectuate a legitimate local purpose and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

products in interstate commerce. (Peck's Affidavit, ¶¶ 11 and 13.) The taxing scheme's easily invoked, vaguely worded Take Back Provisions make this purpose clear. The direct result of Florida's alcoholic beverage tax scheme is the prohibited effect on interstate commerce. (Peck's Affidavit, ¶¶ 11 and 13.)

2. The Florida Tax Does Not Serve a Legitimate Local Purpose.

As discussed above, Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. This purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that – whether the implementation is non-discriminatory or not – is constitutionally suspect under the Commerce Clause. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-39 (1949). *Accord* L. Tribe, *American Constitutional Law* § 6-12, at 340-42 (1978) (contrasting health and safety laws with local economy laws). As the Supreme Court noted in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980):

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Id. at 43-44.

Florida's putative desire to respond to other states' discriminatory laws also carries no constitutional weight. In order to respond to another state's economic barriers, Florida cannot construct laws to

coerce the other state's legislature to lower its barriers. Rather, as noted above, Florida or its citizens should merely file an action under the Commerce Clause. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 380 (1976).

Moreover, the Florida tax cannot survive Commerce Clause scrutiny by attempting to compensate Florida products for any disadvantages other states may inflict. Even if Florida's compensating disadvantaged products were a legitimate state goal, the Florida tax irrationally relates its advantages for specific products under specific circumstances to the disadvantages the specific products suffer under other states' statutes. Florida's identification of any home state advantage (no matter how small) results in the loss of all Florida benefits (no matter how large). For example, if a New York manufacturer received a New York state subsidy of ten cents a gallon on wine exports to Florida, the manufacturer would lose his entire Florida exemption of as much as $3.50 per gallon. The statute's failure to calibrate its impact is a fatal constitutional defect. *See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982) (state must narrowly tailor any reciprocity requirement to the state's legitimate purposes).

3. The Florida Tax Imposes Excessive Burdens on Interstate Commerce.

Florida's tax scheme necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, Florida has the burden of demonstrating that the local benefits from its tax outweigh the burden on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977). Florida must justify its discriminating tax "both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. at 336. *See also Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982). Florida cannot possibly carry this burden of proof.

Assuming, *arguendo*, that Florida can show that its tax scheme has nurtured the local industry, Florida could have achieved the same result using means less discriminatory than a disproportionate tax on non-Florida alcohol. Indeed, several such alternatives have received express judicial approval under the Commerce Clause.

Among the many less discriminatory alternatives, Florida could have provided state income or property tax relief to Florida's manufacturers or growers. The courts have approved this method of encouraging local industry. *See, e.g., Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985) (property tax relief is permissible to promote winemaking). This type of non-discriminatory tax reform, which relieves local competitors of a tax, does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not "'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

As another less discriminatory alternative, Florida could have stimulated its agricultural industry with direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products. *See generally Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. at 864 (discussing several alternatives).

In other words, Florida can effectively promote its industry without violating the Commerce Clause precept that it not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 337.

III. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

The Revised Florida Products Exemption violates a fundamental premise of federal-state relations. By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs. Accordingly, Florida's statutes are unconstitutional. *See Zschernig v. Miller*, 389 U.S. 429, 430-41 (1968); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980); *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. 800 (Ct. App. 1969); L. Tribe, *American Constitutional Law* § 4-5, at 172 (1978); 2 C. Antieau, *Modern Constitutional Law* § 10:19, at 37-38 (1969). *Cf. Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *United States v. Belmont*, 301 U.S. 324, 327-32 (1937).

The framers of the federal Constitution feared that individual states might impair foreign relations by unilateral action in the international sphere. "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." *The Federalist* No. 80, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

In accordance with the clear intentions of the framers, the Supreme Court has declared without ambiguity that the individual state "does not exist" in the realm of foreign affairs. *United States v. Belmont*, 301 U.S. 324, 331 (1937). "Whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *Id.* at 331-32.

The Supreme Court applied these principles in *Zschernig v. Miller*, 389 U.S. 429 (1968), to invalidate an Oregon statute that conditioned the right of aliens to inherit property on the existence of reciprocal rights for United States citizens in foreign countries. The Oregon statute required state courts to inquire into the laws and policies of foreign governments and induced foreign nations to frame their inheritance laws in a manner that would insure Oregonians reciprocal inheritance rights. *Id.* at 433-41. The Supreme Court found that the Oregon statute "ha[d] a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Accordingly, the statute was unconstitutional as a form of "state involvement in foreign affairs and international relations – matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436. See also *Tayyari v. New Mexico State University*, 495 F. Supp. at 1377-80; *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. at 802.

Florida's statutes, like Oregon's statute in *Zschernig v. Miller*, "illustrate the dangers which are involved if each State, speaking through its . . . courts, is permitted to establish its own foreign policy." 389 U.S. at 441. Florida's intrusion into foreign affairs, however, is even deeper than Oregon's. Unlike the reciprocal inheritance statute in *Zschernig*, Florida's statutes directly conflict with specific, definitive articulations of United States foreign policy. Congress, to whom the Constitution exclusively entrusts the regulation of "Commerce with foreign Nations," has enacted laws that pervasively regulate the imposition of customs duties on foreign imports. Federal law preempts state tax laws that intrude into this exclusively federal field. U.S. Const., art. I, § 8, cl. 3 (Commerce Clause). *See Xerox Corp. v. County of Harris*, 459 U.S. 145, 159 (1982); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).

Congress' preemption of a field withdraws all legislative power from the individual states. "'[W]here the federal government, in the exercise of its superior authority in [a] field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.'"

Graham v. Richardson, 403 U.S. 365, 378 (1971) (quoting from *Hines v. Davidowitz*, 312 U.S. 52, 66—67 (1941)) (immigration). *See also Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982) (customs).

Since federal legislation has preempted the field of customs regulations, this Court need conduct no further inquiry to find that the Revised Florida Products Exemption is unconstitutional. Further inquiry, however, illustrates specific conflicts between federal and Florida law.

Florida's Take Back Provisions deny tax preferences and exemptions to the products of countries that provide certain economic advantages to their own producers. Fla. Stat. §§ 564.09 and 565.12 (1985). The Florida Attorney General's office has candidly described the Take Back Provisions as an effort to "foster a 'level playing field'" in the alcoholic beverages trade. *See* "Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment," at 4 (filed July 21, 1986, in Case No. 86-773). Florida's statutes are designed to level the playing field in two ways: (1) by preventing "*one-way* 'double-dipping'" ("the granting of a compounded benefit to producers in jurisdictions which already allow an exclusive, parochial incentive for such products"); and (2) by "discourag[ing] the implementation or continuance of purely local favoritism in other jurisdictions." *Id.* at 3. In other words, Florida retaliates against countries that favor their own products and attempts to change the trade policies of other countries.

With these goals, Florida's statutes cannot pass muster under the Supremacy Clause. Federal legislation preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940). Florida's Take Back Provisions are an obstacle to the Congressional purposes expressed in specific laws that direct the United States' commerce with foreign nations. These laws include the Trade Act of 1974, as amended (19 U.S.C.A. §§ 2411 through 2415 (West Supp. 1986)); the Tariff Act of 1930, as amended (19 U.S.C.A. §§ 1301 through 1677h (West Supp. 1986)); the

Caribbean Basin Economic Recovery Act (19 U.S.C. §§ 2701 through 2706 (West Supp. 1986)); and the Wine Equity and Export Expansion Act of 1984 (19 U.S.C.A. §§ 2801 through 2806 (West Supp. 1986)). Florida's statutes also violate the United States' international obligations under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6) (1947). Each of these federal laws preempts Florida's.

A. The Trade Act of 1974.

Congress, in the Trade Act of 1974, gave the President broad authority to negotiate trade agreements and to respond to actions by foreign countries that disadvantage United States commerce. Congress saw the need "to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7188). Florida, by taking unilateral action to level the international playing field, has unconstitutionally intruded into this exclusive federal area.

Section 301(a) of the Trade Act, as amended, authorizes the President to take "all appropriate and feasible action within his power" to "respond to any act, policy, or practice of a foreign country" that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." 19 U.S.C.A. § 2411(a)(1)(B)(ii) (West Supp. 1986). Congress considered the President's retaliatory authority "a vital aspect of the trade negotiations" that the Trade Act authorized. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7208-09). In the exercise of his broad statutory power, the President may selectively impose discriminatory tariffs and other restrictions against particular products and particular foreign countries. 19 U.S.C.A. § 2411(a)(2)(A) & (B) (West Supp. 1986). For example, the President recently authorized quantitative restrictions on certain European wine imports in response to European Economic Community restrictions on various United States products. 51 Federal Register 18,296 (May 16, 1986).

Congress has purposefully given the President central authority to direct the United States' response to burdens on its foreign commerce. The President must select the United States' retaliatory actions in light of international economics and politics. As Congress noted, "[t]rade policies cannot be divorced from other important contributions to, or influences on, the U.S. and world economies." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7189). Florida's unsanctioned interference in this process can only hinder the federal government's efforts to achieve beneficial trade relations for the whole United States.

B. The Tariff Act of 1930.

Section 303 of the Tariff Act of 1930, as amended, protects United States commerce from foreign subsidization of exports. Under the Tariff Act, whenever the Secretary of the Treasury determines that a foreign export has received a subsidy, the Secretary must levy a countervailing duty in the amount of the subsidy. 19 U.S.C.A. § 1303(a)(1) (West 1980).

Similarly, Florida's Take Back Provisions impose discriminatory taxes on alcoholic beverages from countries "which provide export subsidies for agricultural products used in making said alcoholic beverages" or "other economic incentives or advantages." Sections §§ 564.06(9)(b) & (c) 564.12(1)(c)(2) & (3), and §§ 565.12(2)(c), Florida Statutes (1985). By thus intruding into the area of foreign export subsidies, Florida's statutes frustrate the goals of the federal countervailing duty statute.

The federal Act was carefully drafted to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies." *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978). The Secretary of the Treasury is empowered to establish regulations to "accurately carry out this purpose." *Id. See also* 19 U.S.C.A. §§ 1303(b) and 1677 (West 1980). In light of the federal policy of measured response, Florida cannot impose its own additional tax. Florida's discriminatory tax

frustrates Congress' intention to offset accurately foreign trade advantages.

C. The Caribbean Basin Economic Recovery Act (CBERA).

Congress enacted the Caribbean Basin Economic Recovery Act (CBERA) in 1983. The purpose of CBERA is to address "deep-rooted structural problems" in the Caribbean Basin which have "caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payments deficits, and a pressing liquidity crisis." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644). The legislative history demonstrates Congress' concern that "this economic crisis threatens political and social stability throughout the region and creates conditions which Cuba and others seek to exploit through terrorism and subversion." *Id.* (reprinted in 1983 U.S. Code Cong. & Admin. News 643, 644).

Through CBERA, Congress has addressed Caribbean Basin problems by authorizing the President to offer trade benefits to Caribbean nations that satisfy certain political, economic, and social criteria. 19 U.S.C.A. § 2702 (West Supp. 1986). "The centerpiece of the U.S. program is the offer of *one-way* free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644) (emphasis added). *See also* Message to the Congress Transmitting the Proposed Caribbean Basin Economic Recovery Act, 18 Weekly Comp. Pres. Doc. 323 (Mar. 17, 1982). CBERA authorizes a *complete* exemption from United States customs duties for most products, including sugarcane rum, from qualified Caribbean nations. Congress specifically intended to increase sales of Caribbean rum by reducing the price to U.S. consumers. CBERA eliminates the usual $10.50 per proof gallon excise tax on imported distilled spirits. H. Rep. No. 98-26, 98th Cong., 1st sess., at 26 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 667). *See* 19 U.S.C.A. § 2701 (West Supp. 1986).

Florida, a major producer of sugarcane, competes in the market for alcoholic beverages with several Caribbean nations. (Collins' Affidavit, ¶ 8.) The Revised Florida Products Exemption affects, for example, the rum market by granting preferential tax rates to alcoholic beverages made from Florida sugarcane. Florida's potential denial of these preferences to Caribbean rum would frustrate the federal policies expressed in CBERA. At the same time the United States seeks to *decrease* the price of Caribbean rum through an exemption from customs duties, Florida threatens to *increase* the price through its Take Back Provisions. The federal purposes expressed in CBERA will fail if Florida is free to impose a tax that offsets the competitive advantages that Congress has conferred. *Cf. Xerox Corp. v. County of Harris*, 459 U.S. 145, 152 (1982).

Further, Florida's administration of the Take Back Provisions directly involves Florida courts in impermissible foreign policy judgments. The factors that the Florida legislature has directed its courts to consider in applying the Take Back Provisions overlap with the factors that the President considers in determining whether to grant a particular Caribbean nation beneficiary status under CBERA. For example, a Florida court applying the Take Back Provisions considers whether a foreign country "impose[s] discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries," "provide[s] agricultural price supports or other economic incentives or advantages," or "provide[s] export subsidies." Sections 564.06 and 565.12, Florida Statutes (1985). Under CBERA, the President considers:

> (3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;
>
> . . .
>
> (5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade . . . .

19 U.S.C.A. §§ 2702(c)(3), 2702(c)(5) (West Supp. 1986). In essence, Florida law directs Florida courts to make unauthorized foreign policy judgments that may subvert the President's and Congress' legitimate foreign policy judgments.

D. The Wine Equity and Export Expansion Act of 1984.

The Wine Equity and Export Expansion Act of 1984 is Congress' effort to remedy "a substantial imbalance in international wine trade." 19 U.S.C.A. § 2801(a)(1) (West Supp. 1986). Like Florida, Congress was concerned that "the United States wine industry faces restrictive tariff and nontariff barriers in virtually every existing or potential foreign market." *Id.* The Act requires the President to "direct the [United States] Trade Representative to enter into consultations with each major wine trading country to seek a reduction or elimination of that country's tariff barriers and nontariff barriers to (or other distortions of) trade in United State wine." 19 U.S.C.A. § 2804(a) (West Supp. 1986). The Act also authorizes the President to take action under the Trade Act of 1974 to respond to foreign trade barriers. 19 U.S.C.A. § 2804(c) (West Supp. 1986).

Florida's Take Back Provisions directly intrude into the federal government's diplomatic and regulatory activities in this area. Florida imposes its own discriminatory tax on "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries." Sections 564.06(9)(a), 565.12(1)(c)(1), and 565.12(2)(c)(1), Florida Statutes (1985). Florida's sharing some of the federal government's goals in this area does not provide a legitimate occasion for Florida to make foreign policy. "Only the federal government can fix the rules of fair competition when such competition is on an international basis." *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. at 800, 803 (Cal. Ct. App. 1969). "[T]he existence of [a] federal Act cannot serve as a justification for state legislation since . . . it is the sole province of the federal government to act in this sphere." *Id.* at 804 n.8.

E. The General Agreement on Tariffs and Trade (GATT).

In the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6), the United States and its major trading partners have pledged to refrain from specific discriminatory trade practices. The Take Back Provisions of the Revised Florida Products Exemption directly conflict with the United States' obligations under GATT.

GATT prohibits discriminatory taxes such as Florida's with the following provision:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.

GATT, pt. II, art. III, § 1, 61 Stat. (part 5) A18 (1947) (first sentence). By definition, any application of Florida's Take Back Provisions to the products of a foreign country would violate GATT. Whenever a Florida court applies a Take Back to a foreign product – thus withholding the tax exemption or preference afforded to Florida products – that product is burdened with "internal taxes . . . in excess of those applied directly or indirectly to like products of national origin."

GATT, as an international agreement, supersedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. *See generally United States v. Belmont*, 301 U.S. 324, 331-32 (1937). Indeed, one court has held unconstitutional a state statute that contravened GATT by placing restrictions on the sale of foreign imports. *Territory v. Ho*, 41 Haw. 565, 567–71 (1955). However, regardless whether GATT directly preempts inconsistent state legislation, GATT is also an authoritative articulation of United States foreign policy with which Florida may not interfere. Thus, Florida's interference with foreign policy is invalid under *Zschernig v. Miller*, 389 U.S. 429 (1968).

Florida's attempt at the regulation of foreign affairs is, in a word, unconstitutional.

IV. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE

The Import-Export clause provides:

> No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws . . . .

U.S. Const. art. 1, § 10, cl. 2. The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to "speak with one voice." *Michelin Tire Corp. v. Wages Tax Commisioner*, 423 U.S. 276, 285 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. *Id.* at 288 n.7. *See also Cook v. Pennsylvania*, 97 U.S. 566 (1878).

The Revised Florida Products Exemption, by authorizing the denial of tax exemptions to foreign alcohol, effectively imposes a duty upon imports. As a result, Florida's statutes violate the Import-Export Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 2; *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374, 1376 (Fla. 1984).

As discussed above, Florida's Take Back Provisions expressly authorize discrimination based on national origin. The Take Back Provisions empower Florida courts and officials to examine and judge the agricultural and trade policies of foreign governments. This examination presupposes calculated discrimination. In effect, Florida's statutes frustrate the Import-Export Clause's purpose by creating foreign policy and invading the federal government's exclusive jurisdiction over the regulation of commerce with other nations.

The Import-Export Clause, as the Supreme Court interprets it, leaves no room for the Revised Florida Products Exemption. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286. Although the Import-Export Clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. The Court in Michelin Tire Corp. approved a nondiscriminatory state property tax because, unlike Florida's statutes, "it [could not] be used to create special protective tariffs or particular preferences for certain domestic goods, and it [could not] be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.* at 286.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), for example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law succumbed. *See also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827) (invalidating discriminatory tax on imports); *Cook v. Pennsylvania*, 97 U.S. 566, 569 (1878) (invalidating taxes at retail level that favored certain specified domestic goods).

In addition, the Florida Supreme Court's own analysis of the Import-Export Clause agrees with the United States Supreme Court's. In the recent case of *Miller v. Publicker Industries, Inc.*, 457 So. 2d 1374 (Fla. 1984), the Florida Supreme Court held unconstitutional a Florida tax that exempted motor fuels containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. The Florida Supreme Court held the tax exemption unconstitutional because it "constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause." *Id.* at 1376.

The Florida Supreme Court's analysis in *Publicker* applies here. The tax in *Publicker* expressly favored goods of "U.S. origin." The Revised Florida Products Exemption's discrimination is less obvious in its effect on foreign goods because the legislature drafted the statute using generic descriptions of Florida products. Nevertheless, in this case, as in *Publicker*, the Florida legislature has authorized discrimination based on national origin. Moreover, as in *Publicker*, Florida can discourage the consumption of foreign products by applying the Revised Florida Products Exemption's Take Back Provisions.

Florida's tax scheme is unconstitutional under the Import-Export Clause.

V. THIS COURT SHOULD ENTER A PRELIMINARY INJUNCTION AGAINST FLORIDA'S ENFORCEMENT OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

During the pendency of this litigation, this Court should prevent further unconstitutional injury to McKesson and others by enjoining Florida's enforcement of the unconstitutional statutes. Unquestionably, this Court has that power. *See, e.g., Bailey v. Christo*, 453 So. 2d 1134, 1136-37 (Fla. Dist. Ct. App. 1984), *review denied*, 461 So. 2d 113 (Fla. 1985); *Department of Professional Regulation v. Florida Psychological Practitioners Association*, 461 So. 2d 198 (Fla. Dist. Ct. App. 1984).

Under Florida law, this Court may grant an injunction upon a showing: (1) that McKesson has a clear legal right to relief; (2) that McKesson does not have an adequate remedy at law; (3) that McKesson will otherwise suffer irreparable harm; and (4) that granting an injunction will not disserve the public interest. *See, e.g., Finkelstein v. Southeast Bank*, 490 So. 2d 976, 980 (Fla. Dist. Ct. App. 1986). McKesson satisfies each requirement.

A. McKesson Has a Clear Legal Right to Relief.

McKesson has demonstrated that Florida's statutes unconstitutionally burden interstate commerce, intrude into the federal government's exclusive power over foreign affairs, and place an impost or duty on imports. Accordingly, McKesson has a clear right to relief under the Commerce, Supremacy, and Import-Export Clauses of the United States Constitution.

B. McKesson Does Not Have an Adequate Remedy at Law.

McKesson submits that the only remedy that will adequately protect McKesson's rights is an injunction. Unless this Court enjoins further enforcement of Florida's unconstitutional statutes, McKesson and others will have to continue paying the tax and prosecuting actions for refunds. Avoidance of an illogical multiplicity of actions is a "well recognized basis for injunctive relief." *Dotolo v. Schouten*, 426 So. 2d 1013, 1015 (Fla. Dist. Ct. App. 1983). *See also Deltona Corp. v. Adamczyk*, 492 So. 463, 463 [sic] (Fla. Dist. Ct. App. 1986); *Carolina v. Regan*, 465 U.S. 367; *Dows v. Chicago*, 11 Wall. (78 U.S.) 108, 109-10 (1871).

Even in a series of refund actions, however, McKesson may not have an adequate remedy. McKesson has requested an award of interest, but the State will undoubtedly argue that it has no statutory obligation to pay interest. *See, e.g., Flack v. Graham*, 461 So. 2d 82 (Fla. 1984); *State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson*, 322 So. 2d 525 (Fla. 1975). The possible unavailability of interest makes McKesson's legal remedy inadequate and justifies the issuance of injunctive relief. A damage remedy that does not compensate McKesson for the loss over time of the use of millions of dollars is not an adequate remedy.

Courts have long recognized that a refund of taxes without interest is not an adequate remedy. In a leading case, Judge Learned Hand articulated the basic principles:

> it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Procter & Gamble Distributing Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924). Similarly, the court in *United States v. Livingston*, 179 F. Supp. 9, 15 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960), stated: "[i]t is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld." By denying interest on refunds, a state "necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statute." *Id. See also Nutt v. Ellerbe*, 56 F.2d 1058, 1062 (E.D.S.C. 1932).

C. McKesson Will Suffer Irreparable Harm Without Injunctive Relief.

Even if Florida were to concede its liability for interest on any refund, Florida's unconstitutional discrimination against McKesson constitutes sufficient irreparable harm to justify an injunction. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 at 440 (1973 & Supp. 1986). *See, e.g., Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350, 1356 (N.D. Texas 1981).

D. The Public Has No Interest in Florida's Enforcement of an Unconstitutional Tax.

This Court's consideration of the public interest ends with a finding that Florida's statutes are unconstitutional. State statutes that place an unconstitutional burden on commerce, or interfere with the federal government's foreign affairs powers, or impose an impost or duty on imports do not serve the public interest. To the contrary, "the public has no interest in the enforcement of laws in an unconstitutional manner." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (granting injunctive relief under the Commerce Clause against state enforcement of state corporate takeover statutes). *Accord L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 209 (6th Cir. 1985).

The federal Constitution invalidates Florida's tax, and "the Constitution is the ultimate expression of the public interest." *Llewelyn v. Oakland County Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975). Florida's citizens, as well as all other states' citizens, have an interest in maintaining free, unrestricted trade among the states. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977). This federal interest overrides each state's "'estimate of its own interests [and] the importance of its own products.'" *See H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533-34 (1949) (quoting Story, The Constitution §§ 259, 260).

This Court's enjoining Florida's enforcement of the Revised Florida Products Exemption will vindicate the public interest through the enforcement of McKesson's and others' constitutional rights.

CONCLUSION

When the Florida legislature enacted the Revised Florida Products Exemption in 1985, the legislature hoped to avoid the Supreme Court's ruling in *Bacchus* but still preserve the State's policy of protection for parochial interests. The new Florida statutes did not cure the old statutes' defect. Florida continues to discriminate

impermissibly against interstate and foreign commerce in violation of the Commerce Clause and the Import-Export Clause. Moreover, the new statutes suffer from a new constitutional flaw. Florida, in its effort to construct a barrier to competition, has also encroached upon the federal government's exclusive power over foreign affairs. This Court must end Florida's violation of the federal constitution's proscriptions by finding the statutes unconstitutional and by enjoining their enforcement.

Dated: October 16, 1986.

/s/ James M. Ervin Jr.
Martha W. Barnett
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and

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

No. 86-2997

(Caption omitted in printing)

THOMAS E. COLLINS' AFFIDAVIT IN SUPPORT OF PLAINTIFF McKESSON CORPORATION'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

State of California)
)
County of San Francisco)

Before me this day personally appeared Thomas E. Collins who, being duly sworn, deposes and says:

1. I am a resident of the State of Florida, am over 21 years of age, and have personal knowledge of the facts in this affidavit.

2. I am a Regional Vice President for McKesson Wine & Spirits Co. I supervise the operations of McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors in Florida.

3. McKesson Corporation, which does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors ("McKesson"), has been a wholesale distributor of domestic and imported alcoholic beverages in Florida and has been licensed by the Division of Alcoholic Beverages and Tobacco pursuant to section 561.14, Florida Statutes (Supp. 1985).

4. McKesson has paid excise taxes pursuant to sections 564.06 and 565.12, Florida Statutes (Supp. 1985) on the alcoholic beverages

that it sells to its customers in Florida. McKesson has paid such taxes whether or not McKesson has been paid by its customers for its products. On occasion, McKesson hss not been paid by its customers for its products.

5. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has been a distributor of alcoholic beverages that are taxed under sections 564.06(1), 564.06(3), 565.06(4), 565.12(1)(a), and 565.12(2)(a), Florida Statutes (Supp. 1985).

6. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has not been a distributor of alcoholic beverages that benefit from the tax exemptions and preferences in sections 564.06(2), 564.06(3), 564.06(4), 565.12(1)(b), and 565.12(2)(b), Florida Statutes (Supp. 1985).

7. McKesson's products, which do not benefit from the tax exemptions in section 564.06, directly compete with other distributors' products which do benefit from the tax exemptions in section 564.06, Florida Statutes (Supp. 1985). For example, McKesson distributes wines containing more than one percent alcohol by weight and less than 14 percent alcohol by weight, such as Bartles & Jaymes wine coolers (from California), Calvin Coolers wine coolers (from Pennsylvania), Chantovent wines (from France), Folonari wines (from Italy), Gallo wines (from California), Papillon wines (from France), Piat D'Or wines (from France), Rene Junot wines (from France), Summit California wines (from California), and Takara Plum wines (from Japan), which do not benefit from the tax exemptions, that directly compete with Florida products such as Caribbean wine coolers, Florida wine coolers, Jean de Noir wine, Lafayette wines, Aorenz Blanc wine, and Palmetto Country wines, which do benefit from the tax exemptions; McKesson distributes wines containing 14 percent or more alcohol by weight, such as certain Gallo wines (from California), Harvey's Bristol Cream (from Spain), Harvey's Port (from Portugal), and Harvey's Sherry (from Spain), which do not benefit from the tax exemptions, that directly compete with Florida products such as Bacco and Blue Fox, which do benefit

from the tax exemptions; McKesson distributes natural sparkling wines such as Andre (from California), Paul Cheneau (from Spain), and Tosi Asti Spumanti (from Italy), which do not benefit from the tax exemptions, that directly compete with Florida products such as Lafayette sparkling wines, which do benefit from the tax exemptions. Many other McKesson products, which do not receive the tax exemptions, compete with the Florida products which do receive the tax exemptions.

8. McKesson's products, which do not benefit from the tax preferences in section 565.12, directly compete with other distributors' products that do benefit from the tax preferences in section 565.12, Florida Statutes (Supp. 1985). For example, McKesson distributes alcoholic beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, such as Absolut Vodka (from Sweden), Burrough's Vodka (from England), Gilbey's Vodka (from Ohio), Popov Vodka (from Connecticut), Smirnoff (from Michigan) Vikin Fjord Vodka (from Norway), Volga Vodka (from Maryland), Beefeater Gin (from England), Bellows Club Gin (from Ohio), Milshire Gin (from Connecticut), Bacardi Rum (from Puerto Rico), Don Q Rum (from Puerto Rico), Mt. Gay Rum (from Barbados), and Castillo Rum (from Puerto Rico), which do not benefit from the tax preferences, that directly compete with Florida products such as Five Flags Vodka, Saxony Vodka, Whitehall Vodka, Five Flags Gin, Saxony Gin, Whitehall Gin, Jose Gaspar Rum, Old Florida Rum, and Ron Matusalem Rum, which do benefit from the tax preferences. Many other McKesson products, which do not receive tax preferences, also compete with the Florida products which do receive tax preferences.

9. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has suffered a significant loss in sales of its products as a result of the competition with other distributors' products that have received the tax exemptions and preferences.

/s/ Thomas E. Collins
THOMAS E. COLLINS, Affiant

Sworn to and subscribed before me this 9th day of October, 1986.

/s/ L. Margaret Birkhoffer
Notary Public

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

No. 86-2997

(Caption omitted in printing)

ANNE E. PECK'S AFFIDAVIT IN SUPPORT OF PLAINTIFF McKESSON CORPORATION'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

State of CALIFORNIA)
)
County of SANTA CLARA)

Before me this day personally appeared Anne E. Peck who, being duly sworn, deposes and says:

1. I am a resident of the State of California, am over 21 years of age, and have personal knowledge of the facts in this affidavit.

2. I am Associate Professor and Associate Director of the Stanford Food Research Institute of Stanford University. I received my Bachelor of Science in mathematics from Stanford University in 1969, my Master of Arts from the Stanford Food Research Institute in 1970, and my Doctor of Philosophy from the Stanford Food Research Institute in 1973. From 1973 until 1976, I was Assistant Professor of Agricultural Economics at Purdue University. From 1980 until 1981, I was Visiting Associate Professor at the Harvard Graduate School of Business Administration. From 1976 until 1979, I was Assistant Professor at the Stanford Food Research Institute. Since 1979, I have been Associate Professor at the Stanford Food Research Institute. At these universities, I have taught courses on agricultural economics, including courses on agricultural prices and markets and commodity futures markets. I have served: as Project Director at the American

Enterprise Institute, from 1983 through 1984, directing the Study of the Economics and Regulation of Futures Markets; as Director at the Chicago Board of Trade Research Foundation, from 1978 through 1985; as Director at the American Agricultural Economics Association, from 1983 through 1985. I have served as an advisor to the World Bank and to the Food and Agriculture Organization of the United Nations. I have edited numerous books on futures markets and published more than a dozen articles on agricultural economics.

3. A manufacturer of alcoholic beverages could use any one of several of the grains and vegetables produced in the United States, such as corn, wheat, barley, potatoes, and sugar beets, in the manufacture of alcohol for alcoholic beverages. Almost all states commercially produce such grains and vegetables. According to United States Department of Agriculture statistics for 1980 through 1985, 47 states commercially produce corn in significant amounts; 42 states commercially produce wheat in significant amounts; 29 states commercially produce barley in significant amounts; 38 states commercially produce potatoes in significant amounts; and 13 states commercially produce sugar beets in significant amounts.

4. A manufacturer of alcoholic beverages could also use citrus fruit in the manufacture of alcohol for alcoholic beverages. Only a few states produce citrus in commercially significant amounts. According to United States Department of Agriculture statistics for 1980 through 1985, only Arizona, California, Florida, Louisiana and Texas produce citrus in commercially significant amounts. Florida predominates in the production of citrus in the United States. For example, in 1985, Florida produced 66.4% of the total United States production of citrus fruit, as measured in short tons of production. In that year, no other state produced more than 30% of the total United States production of citrus fruit.

5. A manufacturer of alcoholic beverages could also use sugarcane in the manufacture of alcohol for alcoholic beverages. Only a few states produce sugarcane in commercially significant amounts. According to United States Department of Agriculture statistics for 1980 through 1985, only Florida, Hawaii, Louisiana and Texas

produce sugarcane in commercially significant amounts. Florida leads in the production of sugarcane. For example, in 1985, Florida produced 47% of the total United States production of sugarcane used for sugar, as measured in short tons of production. In that year, no other state produced more than 21% of the total United States production of sugarcane used for sugar.

6. Producers in many states who commercially produce grains and vegetables, which manufacturers can use as a source for alcohol for alcoholic beverages, cannot economically produce citrus and sugarcane in commercially significant amounts. For example, Illinois, Iowa and Nebraska, which are major producers of corn, cannot economically produce citrus or sugarcane; Colorado, Kansas and North Dakota, which are major producers of wheat, cannot economically produce citrus or sugarcane; Montana, South Dakota and Washington, which are major producers of barley, cannot economically produce citrus or sugarcane; Idaho, Maine and Oregon, which are major producers of potatoes, cannot economically produce citrus or sugarcane; and Michigan, Minnesota and Wyoming, which are major producers of sugar beets, cannot economically produce citrus or sugarcane.

7. Producers of grains and vegetables compete with producers of citrus and sugarcane in the sale of raw materials to manufacturers of alcohol for alcoholic beverages. For example, manufacturers of vodka can purchase grains such as corn or vegetables such as potatoes to make the alcohol in vodka or can purchase citrus or sugarcane to make the alcohol in vodka. The manufacturers' choice of raw materials depends upon the respective price of the raw materials and the demand for alcoholic beverages made out of one type of raw material compared to the demand for alcoholic beverages made out of other types of raw materials.

8. Producers of grains and vegetables necessarily suffer an economic discrimination in the competition for sales to manufacturers of alcoholic beverages if any state or country imposes a tax that disadvantages alcoholic beverages made out of grains and vegetables, and advantages alcoholic beverages made out of citrus and sugarcane.

Any such differential in alcohol taxes dramatically affects the demand for the respective alcoholic beverages and consequently affects manufacturers' choices of raw materials. Therefore, for example, since manufacturers of vodka can produce vodka with either corn raw materials or sugarcane raw materials, a producer of corn will lose market share to a producer of sugarcane after a taxing authority intervenes in the market and favors vodka made from sugarcane with a tax advantage.

9. Even when producers of grains and vegetables have price advantages over producers of citrus and sugarcane in the sale of their products to manufacturers, the producers of grains and vegetables suffer an economic discrimination in the competition for sales if any state or country imposes a tax that disadvantages alcoholic beverages made out of grains and vegetables, and advantages alcoholic beverages made out of citrus and sugarcane. Since the price of the producers' raw materials represents a relatively low percentage of the total cost of alcoholic beverages to the consumer, any significant differential in alcohol taxes, which represent a relatively large percentage of the total cost of alcoholic beverages to the consumer, can divest the grain and vegetable producers of a competitive advantage they would otherwise have and confer the competitive advantage on the citrus and sugarcane producers.

10. Producers in many foreign countries can commercially produce grains and vegetables, which manufacturers of alcoholic beverages can use as a source for alcohol for alcoholic beverages. However, many foreign countries that produce grains and vegetables cannot economically produce citrus and sugarcane in commercially significant amounts. For example, Austria, Germany, and Switzerland, which are producers of corn, cannot economically produce citrus or sugarcane; England, Denmark, and Germany which are producers of wheat, cannot economically produce citrus or sugarcane; Finland, Scotland, and Sweden which are producers of barley, cannot economically produce citrus or sugarcane; Ireland, the Netherlands, and Poland, which are producers of potatoes, cannot economically produce citrus or sugarcane; Denmark, Germany, and Sweden, which are producers of sugar beets, cannot economically

produce citrus or sugarcane. Manufacturers of alcoholic beverages in these foreign countries generally use grains and vegetables as a source for alcohol for alcoholic beverages rather than import citrus and sugarcane as a source for alcohol for alcoholic beverages. Many of these manufacturers attempt to export their products to the United States. The demand for their exports depends, in part, upon the prices of their products to United States consumers as compared with the prices of competing products. Since any differential in Florida's taxes on competing products will affect the comparative prices of these products to Florida's consumers, the differential will affect these countries' ability to export their products to the United States.

11. In light of the fact that most states and many countries that produce grains and vegetables used in the manufacture of alcohol for alcoholic beverages do not produce citrus and sugarcane, and the fact that alcoholic beverages made out of grains and vegetables directly compete with alcoholic beverages made out of citrus and sugarcane, Florida's enacting a tax statute that discriminates against alcoholic beverages made out of grains and vegetables and that favors alcoholic beverages made out of citrus and sugarcane will necessarily discriminate against commerce among the states and with foreign countries.

12. Many foreign countries can commercially produce citrus and sugarcane that manufacturers of alcoholic beverages can use as a source for alcohol for alcoholic beverages. However, the majority of these foreign countries have agricultural policies that favor domestic producers through: discriminatory taxes or requirements; agricultural price supports or other economic incentives; or export subsidies. For example, Brazil, Israel, and Italy, which are producers of citrus in commercially significant amounts, and Barbados, Jamaica, and Mexico, which are producers of sugarcane in commercially significant amounts, have policies that favor their domestic producers. Many manufacturers in these countries manufacture the alcohol in alcoholic beverages from their own countries' citrus or sugarcane. Many of these manufacturers attempt to export their products to the United States. The demand for their exports depends, in part, upon the prices of their products to United States consumers as compared with the

prices of competing products. Since any differential in Florida's taxes on competing products will affect the comparative prices of these products to Florida's consumers, the differential will affect these countries' ability to export their products to the United States.

13. In light of the fact that many foreign countries that produce citrus and sugarcane used in the manufacture of alcohol for alcoholic beverages also have agricultural policies that favor domestic producers, and the fact that these foreign countries' alcoholic beverages compete with Florida's alcoholic beverages which are made from the same products, Florida's enacting a tax statute that permits Florida to discriminate against the foreign countries' products and in favor of Florida's products will necessarily permit Florida to discriminate against commerce with foreign countries.

/s/Anne E. Peck
ANNE E. PECK, Affiant

Sworn to and subscribed before me this 10th day of October, 1986.

/s/ Catherine M. Capote
CATHERINE M. CAPOTE,
Notary Public

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997

(Caption omitted in printing)

HAROLD P. OLMO'S AFFIDAVIT IN SUPPORT OF PLAINTIFF McKESSON CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

State of CALIFORNIA)
)
County of YOLO)

Before me this day personally appeared Harold P. Olmo who, being duly sworn, deposes and says:

1. I am a resident of the State of California, am over 21 years of age, and have personal knowledge of the facts in this affidavit.

2. I am Professor of Viticulture and viticulturist, Emeritus at the University of California at Davis. I received my bachelor of science in horticulture from the University of California at Davis and at Berkeley in 1931 and my doctor of philosophy from the University of California at Berkeley in 1934. From 1931 until 1983, I held positions at the College of Agriculture at the University of California at Davis. From 1939 until 1946, I was Assistant Professor of Viticulture and Assistant Viticulturist at the University of California at Davis; from 1946 until 1952, I was Associate Professor of Viticulture and Associate Viticulturist; from 1952 until 1977, I was Professor of Viticulture and Viticulturist; and since 1977, I have been Professor of Viticulture and Viticulturist, Emeritus. Since 1938, I have served as a consultant for various governments throughout the world. My principal field of interest has been the study and improvement of grape varieties, both in the United States and in Europe, Asia, Africa, the Middle East, Central America, and South America. I served as President of the American

President of the American Society of Horticultural Science, Western Region from 1964 until 1965. I have been a Fellow at the American Association for the Advancement of Science, a Guggenheim Research Fellow, a Fulbright Research Scholar, a member of the Genetics Society of America, and U.S. Editor of 'Vitis', International Viticulture Journal. I have received a Laureate "for outstanding contributions to world Viticulture" from the Office of International de la Vigne et du Vin, Lisbon, an Award of Merit from the American Pomological Society, an Award of merit from the American Wine Society, and an Award of Merit from the American Society of Enology and Viticulture.

3. Throughout the world, grape producers generally produce the *Vitis Vinifera* species for the manufacture of wine or wine coolers. Thus, grape producers in France, Italy, Portugal, the Soviet Union, and Spain and grape producers in Arizona, California, Oregon, and Washington generally produce the *Vinifera* species for the manufacture of wine or wine coolers. Grape producers in most of these areas can produce, but generally do not produce, the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* and *Vitis berlandieri* (which are listed in Section 564.06, Florida Statutes (Supp. 1985)) ("Florida species").

4. Within the United States, grape producers in a few states, primarily Florida, Louisiana, and Mississippi, and parts of a few states, primarily Arkansas, South Carolina, and Texas, cannot commercially produce the *Vinifera* species for the manufacture of wine or wine coolers. Grape producers in Florida and these other areas cannot commercially produce the *Vinifera* species because of the characteristics of climate and the prevalence of certain diseases, including Pierce's Disease, that attack the *Vinifera* species . Grape producers in Florida and these few other areas are able to produce the Florida species for the manufacture of wines and wine coolers. Indeed, grape producers in Florida produce only the Florida species for the manufacture of wine or wine coolers.

5. A manufacturer of wines or wine coolers could use the *Vinifera* species to manufacture the alcoholic content of the beverages. Alternatively, a manufacturer of wines or wine coolers could use the Florida species to manufacture the alcoholic content of the beverages. Historically, the manufacturers of wines and wine coolers generally have used the *Vinifera* species because most consumers prefer the taste of the *Vinifera* species and, therefore, demand *Vinifera* species wines. As a result, grape producers outside of Florida (who grow the *Vinifera* species) have had a competitive advantage over grape producers in Florida (who can grow only the Florida species) in the sale of their products to manufacturers of wines and wine coolers.

/s/ Harold P. Olmo
HAROLD P. OLMO, Affiant

Sworn to and subscribed before me this 9th day of October, 1986.

/s/ Elaine H. Fairley
ELAINE H. FAIRLEY, Notary Public

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE OF OFFICIAL ACTIONS OF FLORIDA LEGISLATIVE AND EXECUTIVE DEPARTMENTS

Plaintiff McKesson Corporation ("McKesson"), pursuant to sections 90.202 and 90.203 of the Florida Evidence Code, requests that this Court take judicial notice of the following matters, attached as an Appendix:

1. The attached transcripts of official records of the Florida Legislature regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530, along with their respective companion bills, CS/SB 425 and CS/SB 569, constituting legislative history of the Revised Florida Products Exemption. The attached records are described below:

(a) Florida House Committee on Regulated Industries and Licensing meeting of April 23, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit A. The official tape is on file at the office of the House Committee on Regulated Industries, Room 412, House Office Bldg., The Capitol.

(b) Florida House Committee on Finance and Taxation meeting of May 8, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit B. The official tape is on file at the office of the House Committee on Finance and Taxation, Room 202, House Office Bldg., The Capitol.

(c) Florida House Committee on Appropriations meeting of May 21, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit C. The official tape is on file at the office of the House Committee on Appropriations, Room 219, The Capitol.

(d) Florida Senate Commerce Committee meeting of May 9, 1985 regarding consideration of Senate Bill 425 and 569. APPENDIX, Exhibit D. The official tape is on file at the office of the Senate Commerce Committee, Room 410, Senate Office Bldg., The Capitol.

(e) Florida Senate Finance and Taxation Committee meeting of May 14, 1985 regarding consideration of Senate Bill 425 and 569. APPENDIX, Exhibit E. The official tape is on file at the office of the Senate Finance and Taxation Committee, Room 426, Senate Office Bldg., The Capitol.

(f) Florida Senate floor debate on May 30, 1985 regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530.APPENDIX, Exhibit F. The official tape is on file at the office of the Senate Secretary, Room 404, The Capitol.

(g) Florida House of Representatives floor debate on May 28, 1985 and May 31, 1985 regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530. APPENDIX, Exhibit G. The official tapes are on file at the office of the House Clerk, Room 427, The Capitol.

2. The attached records of actions of executive departments of the State regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530, constituting legislative history of the Revised Florida Products Exemption. The attached records are described below:

(a) Legislative Analysis dated June 18, 1985 recommending action by the Governor regarding CS/CS/CS/HB 521; and Legislative Analysis dated June 18, 1985 recommending action by the Governor regarding CS/CS/CS/HB 530. APPENDIX, Exhibit H.

(b) Memorandum dated June 5, 1985 from the Secretary of the Department of Business Regulation directed to the Governor's office discussing CS/CS/CS/HB 521 and recommending action; and Memorandum dated June 5, 1985 from the Secretary of the Department of Business Regulation directed to the Governor's office discussing CS/CS/CS/HB 530 and recommending action. APPENDIX, Exhibit I.

Wherefore, McKesson Corporation respectfully prays that the Court take judicial notice of the aforementioned matters.

Dated: October 17, 1986.

/s/ James M. Ervin, Jr.
JAMES M. ERVIN, JR.

Exhibit A

FLORIDA HOUSE OF REPRESENTATIVES
Committee on Regulated Industries and Licensing
April 23, 1985
(Tape Transcript)

Chairman: "Yes, by your vote, the Bill passes: Now we'll take up House Bill 521 by Mr. Jones, excise tax on liquor -- whiskey."

Mr. Jones: "Thank you, Mr. Chairman. I'm not an expert in this field...[Gap in recording]. The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. The Hawaiian decision which specified the use of home-grown materials in the product in order to get the exemption has been stricken by the Supreme Court, and the effort here is to correct our statutes in order that we can continue to give these exemptions. I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years. These taxes have not been collected, and I make no effort to change that. If in the eyes of any beholder this legislation expands that exemption, then by all means step forward and give me your amendments which will correct the your amendments which will correct [sic] the bill. Mr. Chairman, in order to move along, Mr. Selph has some amendments I would like to put on. These amendments are offered after

discussions with the Division, the Agency, the department from whence they express the opinion that we were expanding that exemption too much. What we do with these amendments is to restrict the potential of that expansion, and I urge you to pass those, if you would."

Chairman: "Let's take up the first amendment by Representative Selph. This on Page 3, Line 14, New Subsection 5.
Representative Selph?"

Mr. Selph: "This places the burden of proof to receive the exemption upon the applicant seeking the exemption."

Chairman: Are you through, Mr. Selph?"

Mr. Selph: "Yes."

Chairman: "Anybody like to comment or ask Mr. Selph any question about the amendment? Those in favor of the amendment indicate with an 'aye." [sic] [Ayes.] "Opposed? Amendment passes. Next up, file amendment without objection to its passing. Mr. Selph, on Page 2, Line 16, Page 3, Line 13. Mr. Selph to explain."

Mr. Selph: "Mr. Chairman, this includes other raw products in the definition of products."

Chairman: "Questions. Those favoring the amendment, indicate with an 'aye." [sic]

Somebody: "What is the number on the top right corner of that?"

Chairman: "That is Number 3."

Mr. Selph: "We skipped over Number 2."

Chairman: "We did? All right, then let's take it up then. Amendment 2. Let's vote on Amendment 3. Those favoring indicate with an 'aye'. Opposed? Now let's go back to Amendment 2, which will give the staff something to do. Page 1, Line 5, after the semi-colon."

Somebody: "That's title for two."

Chairman: "That's title for two. Boy, this is the most screwed up thing I have ever seen. Those in favor indicate with an 'aye'. Opposed?

Mr. Tucker: "Mr. Chairman, just out of curiosity...[inaudible]."

Chairman: "That's not the process [laughter]. We'll do that for you, Mr. Tucker; in fact, we'll even let you look at the amendment. I want to tell you, Mr. Jones, this is a screwed-up bunch of amendments as far as how you've numbered them and all that."

Mr. Jones: "Mr. Chairman, if you would permit me, I'll go through them. I numbered them specifically so that they'd be together."

[GAP]

Mr. Selph: " . . . license fee of $1,500 upon each applicant who wants to get the preference and this is to help the department bear the administrative burden. "

Chairman: "Questions by the committee? Those favoring indicate with an 'aye'. Opposed? Now, we have had two amendments and the title amendments, right? We are now on Amendment 3, which is on Page 2, Line 16, Page 3, Line 13 and we have passed on that earlier. It's all over with."

Mr.Selph: "No sir."

Chairman: "It's not all over with. Amendment 4, by Selph, and it's on Page 2, Lines 15, 24, 25 and 26 strike. And on Page 3, Line 12 'honey, guavas, papayas and mangos'."

Mr. Selph: "We are limiting the number of products that may be used in the manufacture of these spirits. We did this at the request of the Agency. We are limiting the amount of products that can be used in this thing so that it will not get out of hand, and the previous one that dealt with raw materials, deals with raw materials that might have some subsidy applied to it in another state or territory and therefore be eligible; so we are tightening it up on each case, Mr. Chairman."

Chairman: "Questions by committee? Those favoring the amendment, indicate with an 'aye'. Opposed? The amendment passes. Are there other amendments on the desk? None on the desk. We now have the bill as amended before us, and we have several people who would like to speak for and against the bill. The first one is Mr. Messersmith."

Mr. Messersmith: "Mr. Chairman, I have two amendments."

Chairman: "Oh yeah?"

Mr. Messersmith: "But I'm not going to file them; if I ask questions and get answers, I might not file them. On Page 2 and on Page 3, start with Page 2, for example, Line 6 where it says ' in whole or in part'; the part that bothers me is 'in part.' I am concerned that that could have tremendous problems of people producing parts and bringing them in with only a cup or so of sugar-cane by-products in it. I'm wondering if someone is going to speak to that."

Chairman: "You are concerned about brandy. Mr. Jones, do you have somebody who would answer that, or do we have somebody else with a card that would answer -- who would answer that, and if so which card person would it be?"

Mr. Jones: "Mr. LaRosa can do either."

Mr. LaRosa: "Dennis LaRosa, representing Todhunter International. That question has been answered by Court decision; 'whole or in part' was a major question where Florida distillery seeking partial exemption just under the interpretation you are apparently giving it. It was construed in favor of the State, and the phrase, 'whole or in part' in *Jacquinn [sic] v. The Department of Business Regulation*, it was construed that it all qualifies or none of it qualifies. So the language we felt should remain the same to be consistent with that law decision."

Chairman: "Further questions? Feel pretty good about it, Mr. Messersmith? Further questions? We have the bill as amended before us and Mr. Tucker would like to speak as an opponent." [inaudible comments from back of room]

Chairman: "Mr. Dick Burroughs."

Mr. Burroughs: Mr. Chairman and members of the committee, I appreciate the opportunity to be here to speak on this bill. I understand what Representative Jones' motives are, and I have sympathy for those motives, but I don't have sympathy for this particular bill, simply because I feel it would cause confusion and we would be in court. My attorneys have told us that if this bill passes in a restricted enough form to ensure that no products will be brought into Florida to erode the tax base, that it will become unconstitutional, and it will most likely have a suit. In fact, some manufacturers have indicated to the Department that would be the process. I have asked the industry and Mr. Jones to make the amendments that he made to try to narrow down the possibility of products being brought into Florida that could possibly erode the tax base. However, one of the amendments that was made I am not clear on it, so _____ other raw materials; and I do not know exactly what was intended with that amendment and would first prefer some clarification on that particular issue. I do think that this will enhance the potential of opening up the Florida market at a reduced tax rate to manufacturers outside the State of Florida, because it would have to do that in order to comply with the Supreme Court ruling."

Chairman: "Questions to Mr. Burroughs? Mr. Tobiassen?"

Mr. Tobiassen: "No. 1. . . . About five or six years ago Vince _____ and myself sponsored and passed the bills that gave the Florida wine industry the initial tax incentive to do this and the reason

why, we researched and found that California does the same thing, and this is why their wines are so popular -- to try and encourage Florida residents to grow their own grapes and produce their own wine with this tax incentive, which would allow them to compete with states like California. From what I understand, there was a Court ruling saying that you could not do that, and this bill just is an attempt to correct that so we can continue the incentive in the State of Florida. Now is that wrong or what?"

Mr. Burroughs: "The attempt of the bill is so you can continue to give the preferred tax rate to the distillers or manufacturers of wine here in the State of Florida, that is correct. My attorneys and legal staff do not feel that this particular approach, or any approach for that matter that restricts so that no products can come into Florida, would be constitutional under the *Bacchus* decision. And if we do have a suit, which I feel sure we will have, then the courts would be ruling on a Florida case and not on a Hawaiian case."

Mr. Tobiassen: "One other question, Mr. Chairman. Our original bill said that you would get the tax reduction, tax incentive if you produced Florida wine, grown from Florida grapes. Isn't that essentially what this says?"

Mr. Burroughs: "This bill does not say Florida grapes, it says grapes, and lists the different types of grapes on the wine list. On this particular one it doesn't say Florida citrus, they removed the Florida-grown trying to comply with the Florida Supreme Court, or rather the United States Supreme Court decision. This means that they could make the product with other products.

Jacquinn [sic] says that they cannot use other citrus products because they would spoil before they got there. I think they might have tried at one time to use some Brazilian products. But, whether the Texas products from citrus or the California citrus can be brought in here by refrigerated truck or some other means, I would say that they possibly can use it, if it was their desire to do so under this law."

Mr. Tobiassen: "Mr. Chairman, just one more. What would you suggest we do, if we don't do this?"

Mr. Burroughs: "My attorneys are in a quandary, because I asked them if they could draw a bill that would allow this exemption to the Florida agricultural products and help those distilleries and the wineries of Florida, and they did not feel they could draw one and have it stand up constitutionally."

Chairman: "I think, probably, we understand your situation right now. But we do a lot of things up here when a series of attorneys don't agree or disagree. We will just proceed on after we take care of it legislatively."

Mr. Burroughs: "And I'm in sympathy with you on that, I think it's your prerogative to do that."

Chairman: "All right, further questions of Mr. Burroughs? Mr. Selph."

Mr. Selph: Mr. Burroughs, for those of us who believe in states' rights, which I think is most of us -- most of us Americans -- let me ask you, I've got a -- Howard and I talked about this, and it concerns me, a memo dated August 2, 1984 --

which I guess it's not really a Rule under 120, it's kind of a policy statement from the Department and I know it was promulgated before you became Secretary again -- saying that based on *Bacchus* (?), which applied only to the State of Hawaii, that Florida is going to start collecting the tax in full from everybody. Now, my understanding of our departments is that they were there to enforce and implement Florida statutes, and Florida statutes don't condone this policy. And *Bacchus* did not apply to the State of Florida, only to Hawaii. Why did we do it?"

Mr. Burroughs: "I was not Secretary at the time."

Mr. Selph: "Let me ask you another question. Now we are about to pass, I hope, Mr. Jones' states' rights bill here and the one that follows. do you anticipate the Department, under your administration, just to arbitrarily go out and promulgating [sic] another such policy?"

Mr. Burroughs: "Mr. Selph, when I was Secretary, prior to this time, my philosophy has always been on rules and procedures and policies that none be instigated unless they gave clear statutory authority, and I've so instructed the secretaries and my legal staff in that matter."

Mr. Selph: "Thank you, Secretary Burroughs."

Chairman: "Further questions? Representative MacKenzie."

Mrs. MacKenzie: "Have [sic] the minority office gotten more staff, that Mr. Selph has access to have all his reports?" [laughter]

Chairman: "Not near enough, Mrs. MacKenzie."

Mr. Selph: "We just work hard, that's all."

Chairman: "Any other comments, questions? Okay, thank you, sir. Mr. Tucker, you want to wait awhile?" [inaudible comments from back of room]

Chairman: "We could do that. Ed Ashely."

Mr. Ashely: "Thank you, Mr. Chairman. I'm Ed Ashely and I represent the Wine and Spirits Distributors of Florida and we are proposed [sic] to the rewrite of the bill. When this law was enacted, back in the 1960's, it was designed to promote Florida industry and Florida products, and that's what is has done over the years. Now all of a sudden the United States Supreme Court has come along and has said, 'You can't do that, it's unconstitutional.' And it appears that to the sponsors of the present bill before you, the way to overcome that decision, is to open it up to other states and other products grown and produced outside of the State of Florida. So it appears that we have lost the original intent of the legislation back in the 60s, and that is, to promote Florida industry. We are now trying to protect that industry which was created under that legislation. However, in order to do so, we have got to permit the manufacturers in other states to produce the products, ship it into the state, and receive the same preferential tax treatment. The Florida products has grown since 1971 a hundred and forty-eight percent. The non-Florida products, which is the bulk of your revenue, $6.50 a gallon, has grown 48%. The sales of non-Florida products since 1980 have been absolutely flat, where Florida products

have continued to grow. Now if this pattern continues, obviously your base revenue source from alcoholic beverage, which has always been plentiful, is going to erode. Your reduced rate, which you're considering before you with this bill, will continue to grow, while your full-rate revenue will continue to decline for two reasons: one, because it's doing it all over the United States, and secondly, because of the passage of this bill. And we would ask you to consider that and what it's going to do to your tax base. Thank you."

Chairman: "Mr. Tobiassen for a series of questions."

Mr. Tobiassen: "Yes sir, I appreciate that. No. 1. I would like to ask a questions, [sic] I'm apparently a little confused, I though we were passing this bill in order to maintain the competitive edge for Florida, where we would continue to give more of a tax exemption for Florida wines grown or made from grapes grown in the State of Florida. Is this not the --"

Mr. Ashely: "Representative Tobiassen, this bill does not address wine, it only addresses spirits. You got another bill that will be coming before you that addresses wine. Yes, it will continue to protect that industry. But you've got to keep in mind, according to the lawyers that have drafted this bill, they have come to the conclusion that the only way they can overcome the Court decision -- which I understand in not a real issue in this matter -- is to open it up to the other states who produce similar products from similar grown products, and if they do not have preferential tax in their state, they will under this Bill have the ability to ship their goods in -- i.e.,

Louisiana molasses. Lots of molasses produced in Louisiana. They will be able to ship those goods into the State of Florida, receive the same tax break for similar goods that are produced down in Central Florida."

Chairman: "Mr. Silver moves that we extend the time of the meeting 'till we complete the agenda. Those favoring indicate with an 'aye'. Okay. Further questions? All right, let's see now. Got Mr. Tucker there. Got Larry Williams, Dennis LaRosa. Well, how 'bout it? Oh, you want to take him first, okay. Now you see, I want to keep a couple proponents in the end, too."

Mr. Williams: "My name is Larry Williams; I represent the liquor distillers. I know that some of this will be redundant, so in the interests [sic] of saving time, I think the big question here, as Representative Jones pointed out, you are trying to protect Florida products and the only way to get around it is, to try and make it constitutional, is to open it up to out-of-state products, and we've lost the whole original intent of the law that was passed twenty years ago. What you are asked to do with this bill is to make legitimate something that's illegitimate. And you can adopt it, but you still can't make it legitimate. You are being asked to put state revenues in jeopardy by saying, 'well, let both sides take it to court, let them fight it out at the courthouse,' and if we as distillers have to come and sue the state, asking for refunds for our overpayment, which amounts to about $50,000,000 a year or more as your staff summary shows, then we are being put in an untenable posture of having to sue the state for $150,000,000 to $200,000,000. If we are successful, then that means that the State then

comes back and guess who they'll ask to fill the coffers again? It will be us, and our product is the most highly taxed in the nation here in Florida. Our point is, that you will look at the list of products that have been stricken, the great bulk of them have been stricken from the list of those that originally qualified. We were trying to promote agriculture, now we are saying we are not trying to promote all agriculture, just basically one or two that we use in our process. In fact, we want to add one more to it -- sugar-cane by-products. I think we are creating an unfair advantage for some. You mention the number of jobs that they have in the state. I represent Bacardi, and we have 170 in Jacksonville and 150 in Miami and we bottle the product, but we do not have an advantage here. So there are home people who are opposed to this bill, not just those in the state who are supporting it. The third thing is, that it creates a gaping loophole on who actually would qualify under this bill for the tax break. Any time that you give a $2.45 break, a $2.35 differential, I can tell you that some of the out-of-state distributors would probably look at it very closely on whether or not we would qualify, and if that were to happen, then your state revenues -- which you can project now as being $150 or $160 million a year -- they would be in jeopardy. I just urge you to defeat the bill."

Chairman: "Any questions to Mr. Williams? Okay, we have a James S. Somebody...I can't read it ... Auburndale, Florida."

Mr. Hammond: "That's me. I'm James S. Hammond. I'm the general manager of Jacquinn [sic] Florida

Distilling Company. I thank you for the opportunity to speak here this afternoon. Jacquinn [sic] is very interested in supporting these bills, both the wine and distilled spirits bills, the wine bill being discussed now; because we feel that this bill...the legislature of twenty-two years ago started to develop this industry to support agriculture, and we feel that over this particular period of time, and added to in 1979, that they have in fact done that. And a economic impact study, which I'm sure that you have all seen, indicates that this particular process has brought $128,000,000 worth of impact, and it is true that we have approximately 300 jobs added to the communities. The citrus industry has been hit pretty hard with freezes over the past several years, and now the canker problem. And I submit to you that if we, as winemakers and distillers, cease purchasing their product, then this is going to be a further blow to them, if not a real catastrophe." [sic] The state, as I mentioned a moment ago, has been promoting the grape industry over the past few years, Mr. Tobiassen, and this industry has put several dollars into capital expenditures which are not easily gotten out, especially in the infancy of the stage. And it's going to show I'm sure, in the very near future, and yes you're correct, that California and many, many other States have these incentives; which brings up the point that just a few days ago the State of Mississippi passed a wine bill to do very similar, passed a very similar bill to the one we are suggesting that you do here. This addresses the local economy and so on. The best part, of course, is the fact that because we are in the best industry, and because we are very competitive as a result of an evening of the competition based on the products that we

are in, this allows our product to come in very competitively into the state's market. And the state enjoys, and consumer enjoys, competition; which is not seen in some other states as a result of the lower prices from the outside spirits brought here. Last, I would like to point out that many of the distillers outside are represented by --"

Mr. Silver: "Mr. Chairman. Mr. Chairman -- I'm sorry, I don't mean to -- "

Chairman: "Be still. I'll tell you now. I got to tell you. They think up here they can break in and abuse anybody up here. Now if you were from his district, you wouldn't do this." [Laughter]

Mr. Silver: "Mr. Chairman, my district number is 2. I made that motion to extend the time of the meeting in order to be able to vote on the bill, but we do have a lot of other committee hearings, we also have a very busy schedule today. I'm just wondering if we could wrap this up in some manner, if it could be, because we are running a tight schedule. I can't stay here much longer. I have to be at a deposition."

Mr. Hammond: "Let be close by saying that we very much want to see you support this bill, and thank you very much."

Chairman: "Okay, Mr. Tucker. We want to give everybody an opportunity, but we're going to definitely vote on the bill today, I can tell you."

Mr. Tucker: "Am I coming in there right? I hate it when I can't be heard. Let me tell you I don't have any opposition. My name is Don Tucker. I

represent Southern Wine and Spirits out of Miami, Florida. I have no opposition at all to the bill on wine, and as far as I am concerned it may be constitutionally drawn, it certainly is _____ to this bill. If you think that this bill is going to help the Florida producers, I think you are totally wrong. Now, when you had a bill that did that, which was declared unconstitutional by the United States Supreme Court, even then one of these companies saw fit to go into Santo Domingo and bring in molasses from Santo Domingo and were fined $100,000 by the Department. Now, you are making it legal for them to do that and because they can get it cheaper there, they're going to get it there. They're business people, and they're not going to do it with Florida products just because you're Florida people. The people could care less about _____ producers. They're like everybody else, they're going to get it as cheap as they can get it, and that's not being mean to them, that's the way it is in the business world. And if they can buy products offshore, which they can get because down in the Dominican Republic a person is paid $2.00 a day for working, they can produce and deliver over here and these people can distill it cheaper than they can get it delivered from the Florida producer. And they are going to do it. They've proven they'll do it in the past, and now you're making it legal for them to do it, and you're not going to help your Florida producers, and you might as well see that. And as far as the lawsuits are concerned that could be filed -- what happened in Hawaii was not just the revenue those people had paid in, but the revenue that had been unfairly collected from all the other people that had been paid in, but were supposed to be repaid by the State of Hawaii; so

you're really putting a lot of revenue in jeopardy. I don't have anything else to say, but what I am saying is that what you intend to do is well-intentioned, and well motivated, but it's totally wrong, because you're not doing what you think you're doing. And you're going to mess up the Florida farmers, and they're going to lose all the business that you think they are getting through this bill. I'll answer any questions."

Chairman: "The gentleman from District 1 is recognized."

Mr. Tobiassen: "I wish somebody would tell me why we are even doing this bill. I was under the understanding that we had to do this to maintain the incentive we have for Florida-grown crops to be used in Florida wines and liquors. Now, that apparently is not what this bill does."

Mr. Tucker: "This bill, number one, Mr. Tobiassen, does not address itself to wine. In the wine bill that we do have before you, but this is not the one, but you do have one that defines the grapes, as I understand it, in such a way as to make it only apply to those grapes that can be grown in regions like we have in Florida. And that may or may not be constitutional, I don't know, I'm not a constitutional attorney, but what this bill attempts to do is to solve what problem that the Supreme Court found in granting preferential tax to products that were produced only within the confines of the State, to say and make it apply to produces (sic) regardless of where they were produced, of a certain kind, such as sugar-cane and citrus products or goods. And then an attempt is made to say that it won't apply if those states have a preferential tax in their state. Let me ask you this, if we can't have preferential tax

in Florida, how can they have a preferential tax in Louisiana? Or how they can a (sic) preferential tax in Georgia, constitutionally? So what they're saying is, you can buy it anywhere and produce it anywhere, but what they're going to really do is get it offshore because they can get it for next to nothing and our producers are going to go wanting."

Chairman: "Mr. Tucker, would you answer an unfriendly question, just for the fun of it?"

Mr. Tucker: "Yes. Even seriously."

Chairman: "When you were member of this House, do you remember how you voted on this particular issue?"

Mr. Tucker: "I probably voted for it. Because I was wanting to do what you want to do -- that is, to protect the Florida producer. But if I had thought then that we were voting to allow sugar-cane to come in from other states, or from other countries, and be used and then be given a tax break, I would have voted against it."

Chairman: "So, that was very unfair of me, but I --"

Mr. Tucker: "No, it's not. And I don't remember how I voted, but I probably voted for it."

Chairman: "So in our heart we'll be right, but we may be wrong."

Mr. Tucker: "Well, this may be true, but you know, that's what a lot of people thought about a certain candidate that ran for president one time. Just because in your heart a lot of people thought he

was right -- but they didn't vote for him and he didn't become president. So what I can suggest that you do is keep it in your heart, the desire to help the farmers in the State of Florida, but realize that in reality what you are doing is hurting them, if you vote for this bill."

Chairman: "Thank you. Further questions? Okay, now. We tell it like it is up here, and if you don't know us, then you will know it sooner or later, but Dennis LaRosa is the last speaker. -- That's wonderful, Dennis. You may have picked up one on that one." [Laughter] "Mr. Jones?"

Mr. Jones: Mr. Chairman, again, Mr. Burroughs had a question which we will follow up with him on. It was said that the growth was 148%. I submit to you that this particular industry represents from an early start from of about 3% to what is now 6%, so when you heard 148% increase, it is within a relative span. The people that have spoken opposing this bill now have 94% of the market, and I submit to you that they would like to have the other 6. The cheapest alcohol comes from grain; everything we are talking about here is basically fruit-base, and there is a limitation in that respect. If you are going to operate in Florida, South Texas, Arizona or California you might be able to operate in these areas. If you're going to expand, then your freight becomes a problem and it is no longer competitive with the Florida product and I think I'm safe in saying that. If you get into the problem with Santo Domingo, and $2.00 a day labor, I would submit to you that on Page 3 of the bill, where it says 'any territories, states, country, subdivisions thereof which provide price support or other economic incentives or advantages,'

eliminate that one as a possibility, because the person that seeks to use that alcohol and get the exemption has to go before the court and get a ruling. These people will have standing and I submit to you that we have made it self-policing so that there will be no expense to the State of Florida. Lawsuits can be argued *ad nauseam*, and I urge you to pass the Bill."

Chairman: "Any further question to the sponsor? Call the roll on the Bill."

[The roll is called].

Chairman: "You mean, after all those questions?... By your vote, the bill passes. Take up House Bill 530, Jones, excise tax on wine, same issue."

Mr. Jones: "Mr. Chairman, you have practically the same amendments which need to be adopted."

Chairman: "Where are those amendments? Let's take them just as irrationally as we did the others. Amendment No. 1, the same amendment as on the other bill, those favoring the amendment indicate with an 'aye'. Those opposed. Amendment No. 1."

Somebody: "Idle."

Chairman: "Idle. Those favoring the amendment, indicate with an 'aye'; opposed. Amendment No. 2. Same amendment as on the other bill, only pertaining to wine."

Somebody: "It's only $100 for the wine makers instead of $1500 for the distillers, Mr. Chairman. Title amendment attached to it."

Chairman: "Okay. Those in favor indicate with an 'aye'. Opposed? Title amendment on that issue. Those favoring, 'aye'; those opposed? Passes. Amendment No. 3 takes out the guavas and stuff. Those in favor indicate with an 'aye'. Opposed? Passes. The bill is before us as amended. Further questions, we only have seven people who wish to be heard on this bill."

Somebody: "Mr. Chairman, can we share the same testimony on this?"

Chairman: "Well, you don't want to show the same testimony? Mr. Burroughs, do you need to be heard on this issue? Same concerns. Mr. LaRosa, you have the same concerns about the passages of the Bill. And a new person, Garry Kechen. In favor of the bill. Further questions? Call the roll on the bill as amended."

[The roll is called].

Chairman: "By your vote, the bill passes. Mr. Selph is recognized.

Mr. Selph: "Mr. Chairman, move the committee substitute on 521 and 530."

Chairman: "Those favoring indicate with an 'aye'. Opposed? Mr. Martinez moves to rise."

End of Tape.

Exhibit B

FLORIDA HOUSE OF REPRESENTATIVES
Committee on Finance & Taxation
May 8, 1985
(Tape Transcript)

Chairman: "Mr. Jones."

Mr. Jones: "Thank you, Mr. Chairman. Are we on the wine bill? [sic]

Chairman: "On 521."

Mr. Jones: "Which is the liquor bill."

Chairman: "Would you rather take up the wine first?"

Mr. Jones: "No. sir. That's perfectly fine with me, just so I know which bill I'm talking about. This is not my area of expertise, I come -- "

Chairman: "That's not what you've been telling me for days, trying to get this bill up."

Mr. Jones: "It's amazing, how we can be educated in a very short time, Mr. Chairman. I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. That is wherein lies my interest. I made the statement in Regulated Industries that I had no intention of

expanding the expense of the State of Florida and I'm convinced that this industry does not want that expanded, and after we made it through Regulated Industries we went to your staff -- and I want to commend Mr. Brown for the help that he has given us in seeing that the amendments in your packet have been drawn up. Now the fiscal note to the bill will be impacted by those amendments -- and would it be permissible, Mr. Chairman, to have Mr. Brown explain to us the results of the fiscal impact of those amendments, please?"

Chairman: "Well, we'll ask the staff to do that."

Mr. Jones: "I'm sorry - I said Brown, forgive me."

Staffperson: "The way the amendments are drawn, I'm not sure, maybe we want to go through the amendment process first."

Mr. Jones: "Well, it's your pleasure. I felt that the members would want to know what the amendments would do before we voted on them."

Chairman: "Yeah, what it basically -- what it would do, it will reduce the fiscal impact, because as I understand the amendments that we have here is, as the sales go up the tax break reduces, so that once they reach a certain level they will no longer have the exemption; it's almost a self-destruct type of approach, so that instead of having this thing go on forever, once they get large enough it will eliminate the exemption."

Mr. Jones: "The Department has expressed a concern, if I may, Mr. Chairman, that we're granting an exemption that's gone on a long time. The

industry is concurring here with this amendment, so that as sales increase the exemption will be reduced."

Chairman: "Let's take up the amendments, Mr. Jones."

Mr. Jones: "All right, sir."

Chairman: " On page 1, line 29, and on page 2, line 25 strike, 'manufactured' and insert 'of which the distilled spirit are manufactured exclusively.' And I think that, in other words, it must be exclusively distilled from Florida products. Any? -- without objection." On page 2, line 1, on page 2, line 28 after the word 'by-products', insert 'except for flavoring extracts.' Okay - this follows the first amendment. Without objection. On page 2, line 7 through 20, insert new language: 'the paragraph B tax rates should not apply to alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries. or to alcoholic beverages manufactured or bottled in states, territories or countries which provide agricultural price supports or other economic incentives or disadvantage exclusively for alcoholic beverages produced within their boundaries.' This, I think, is designed to keep from putting someone in who has price support products, to make them even lower with this tax break, is that not correct."

Mr. Jones: "For those of you not familiar with the issue, the State of Hawaii had a legislation similar to ours. The Supreme Court ruled that they could no longer use that method in interstate commerce.

With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits. Our industry being Florida citrus, molasses and cane molasses. Is that the point, Mr. Chairman?"

Chairman: "I think that's - all right, is there any objection to the amendment? Not - shown adopted." On page 3, strike lines 3 through 22, and insert new language: 'tax rate should not apply to alcoholic beverages' -- I believe this gets into the - I think if you get down to line 16 on this, 'on March 1, 1986, the Department of Business Regulations shall determine for the prior calendar years, compared to the year before, if there has been any increase or decrease in alcoholic beverage gallon sales taxed at paragraph 1b and 2b tax rate. If said gallons is [sic] increased in the prior year, the percentage amount of said increase in excess of 5% shall be the percentage increase in the tax rate.' "

Mr. Jones: "This is the meat and potatoes now. As sales increase, you will see the exemption reduced. Also, on (5) where it says, 'March 1st, '86' and so forth, you are getting into some dates there so that your computation of that will only be done once a year. So this is the meat and potatoes amendment, and I would urge its adoption, Mr. Chairman."

Chairman: "Now, all right, Mr. Jones if you ... let me give you an example, or a for instance... if the tax rate went up, I mean if the sales went up 10% each year, for let's say, two or three years and your tax rate goes up, this amendment -- and

then the sales drop -- this amendment doesn't kick back down, does it?"

Mr. Jones: "I would like Staff to respond to that, he did some real hard work last night on this issue."

Staffperson: "Yes, it does, and on lines 23 and 24 it says that if the gallonage has decreased in the prior year, it will move the tax rate down. It moves them both ways."

Mr. Jones: "Does that answer your question, Mr. Chairman?"

Chairman: "Yes, that answers my question, but that concerns me a great deal. It appears to me that the incentive, as your sales go up and they eventually wipe out tax, I like; but I do not like the fact that because you had a bad year that your tax rate should drop. We don't do that with any other business. I wish my business would drop tax rates if I had a bad year."

Mr. Jones: "Mr. Chairman, if you'll look at the next page, there is [sic] two pages to that particular amendment. The first paragraph it continues there, pick up the next sentence, 'provided however, that the 1b tax rate shall not decrease below 4.15 per gallon nor increase above 6.50 per gallon, and the 2b tax rate shall not decrease below 4.75 per gallon nor increase above 9.53.' So your status quo would be retained. If you go up, you would come to that level, but you would not crash through that floor."

Chairman: "Well, what it does, if they had 2 or 3 good years and then they have a bad year, they are all

of a sudden, they could drop back percentage to the same exemptions, so that it would never -"

Mr. Jones: "Well, we are obviously trying to maintain an industry here, Mr. Chairman; we're not trying to increase the exemption, we're simply maintaining the flow."

Chairman: "All right, any questions on the amendment? Any objections to the amendment? Not shown - adopted. Mr. Jones, I'll be honest with you, I'm going to talk to you between here and the floor about - "

Mr. Jones: "We'll make anyone available you want. Remember my primary statement in the beginning -- if we are increasing the loss to the State, show us how to correct it, and we will be glad to do it."

Chairman: "All right, okay. On page 3, line 25, strike $1,500' and insert '$3,000, (sic) plus travel expenses, Department of Business Regulation to audit the manufacturers' records,' this is the ----"

[GAP FOR REST OF TAPE]

Exhibit C

FLORIDA HOUSE OF REPRESENTATIVES
Committee on Appropriations
May 21, 1985
(Tape Transcript)

Mr. Jones: "Mr. Chairman, in lieu thereof I would urge you to temporarily pass that and take up tab 27 and 28, so we can get these two beverage bills out."

Chairman: "Let's show 15, which is House Bill 1347 TP, and let's go then to -- what did you say, Mr. Jones? -- tab 27 and 28. Take up Committee Substitute for House Bill 521 by Finance and Tax, Regulated Industries, CF Jones and others, on Alcoholic Beverages."

Mr. Jones: "Amendments on the desk, Mr. Chairman. The first bill deals with liquors, the hard stuff. What we're doing here is to retain those 300 jobs that have been developed in Florida as a result of our policies towards Florida products. The continuation of the effort on my part to assure you and the Division and others that we're not expanding this thing, requires this series of amendments which Mr. Weiss has prepared for us from Finance and Tax. We increased the tax by $.20 a gallon, and we have a semi-annual review rather than an annual review, which will give you the taxes more frequently. We also have a good measure in here that limits the sale of 200 proof alcohol in the State of Florida. Some teenagers are taking advantage of that, producing 'Purple Passion' which has no smell of alcohol to it; and in agreement with the

doctors and M.A.D.D. mothers, we're going to prevent anything over 153 proof. We chose 153, because there is a rum that sells at 151. In addition to that, you have a series of technical [sic], so to speak, in conjunction with these amendments."

Chairman: "Mr. Jones, let's get on the amendments. We got a whole stack of amendments here. The first amendment is on page 1, line 19. This is a lengthy amendment which inserts a new section 1, and it's a two page amendment. Can you explain the amendment, Mr. Jones?"

Mr. Jones: "The language in there, you notice we're striking 'in any state other than Florida.' If we leave that in there we have the constitutional problem that prompted the whole bill in the beginning. We found that our language was in error; we're striking out 'in any state but Florida.'"

Chairman: "Okay. The effect of all this lengthy amendment is just to strike out that phrase. Is there a debate on the amendment? Is there a debate? Is there objection? Without objection; show that amendment adopted. Now, we are on the next amendment on page 2, line 11, strike '4.15' and insert '4.35'. Mr. Jones?"

Mr. Jones: "My numbers don't coincide. I've lost my place there, Mr. Chairman. What is that one again?"

Chairman: "Okay, this is on page 2, line 11."

Mr. Jones: "Sorry about that."

Chairman: "We are going to strike '4.15'."

Mr. Jones: "This is an increase on tax by .20 cents a gallon, Mr. Chairman. It's going to mean more income, some $400,000."

Chairman: "Just as you explained. Is there a debate? Is there objection? Show that amendment adopted without objection. Now on page 3, line 8, strike '4.75' - '4.95' -- show that adopted without objection. Now the next amendment, a lengthy amendment on page 3, lines 22 through 31, and on page 4, lines 1 through 9, strike all of said lines and insert a lengthy amendment."

Mr. Jones: "We are going from annual review to semiannual review, which means your taxes will be affected twice a year rather than once a year, and it's to our advantage. I move the amendment."

Chairman: "Okay. Is there objection to that amendment? Show the amendment adopted without objection. Now we are on page 4, lines 13 through 17. Strike all of said lines and insert wording, 'non-refundable application fee of $5,000. The Division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.' "

Mr. Jones: "It does exactly that, which provides the extra money for the audit necessary and permits the Division to establish by rule the necessary action. Move the amendment, Mr. Chairman."

Chairman: "Is there objection? Without objection; show the amendment adopted. Now on page 4, line 28 - "

Mr. Jones: "That's the 153 proof amendment, I urge you to adopt it by all means."

Chairman: "Okay. Is there objection? Show that adopted without objection. Now, title amendment without objection. Another title amendment without objection; another title amendment without objection; another title amendment without objection; another title amendment without objection; another title amendment without objection; and a final title amendment. Now on the bill as amended. Is there debate or discussion on the bill as Amended? Mr. Hargrid?"

Mr. Hargrid: "Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill."

Chairman: "Mr. Hargrid, can we show that debate on the next bill instead? Okay - other debate?"

Mr. Jones: "Move the bill, Mr. Chairman."

Chairman: "All right, Mr. Jones moves the bill as a Committee Substitute. Call the roll."

Ms. Morgan: "Representative Burnside -- "

Chairman: (gavelling) Ms. Morgan, I'm sorry, before we have the roll call can I ask Mr. Jones one quick question?"

Mr. Jones: "You're recognized."

Chairman: "Why are we taking out honey, fresh fruit, berries and grapes? Did I miss something in all those amendments?"

Mr. Jones: "No sir, the Division felt like we should limit this as much as possible. So what's left is basically citrus and sugar-cane molasses. We took out those others. Frankly, there is not enough of them used to make any difference anyhow, and they wanted to tighten the bill up to that extent. So you have not damaged yourself."

Chairman: "Well, why, the grape people have been talking to me – "

Mr. Jones: "We are on hard. Are you on 521 or 530?"

Chairman: "521."

Mr. Jones: "That's the hard stuff."

Chairman: "You have another bill that takes care of the grape people's problems?"

Mr. Jones: "Yes, sir. The next bill takes care of them."

Chairman: "All right, fine. Okay, anyone else feel compelled? Call the roll."
[The roll is called.]

Chairman: "The bill passes. Now let's take up tab 28, Committee Substitute, for Committee Substitute, for House Bill 530. Now, Mr. Morgan, this is a bill that you and Mr. Hargrid are sponsoring."

Mr. Jones: "This is the wine bill, Mr. Chairman. We are going to make it possible for the retailer to sell

without losing the tax differential. We are going to -- "

Chairman: "Basically, Mr. Jones, this is the same bill, in essence, for the wine. Let's go through the amendatory process again first."

Mr. Jones: "All right, sir."

Chairman: "On page 3, line 31 through page 4, line 2, beginning with the word 'shall' on page 3, line 31, and all of said lines 1 and 2 on page 4, strike that language and insert 'all retail sale of wine at licensed wineries shall not be construed as economic incentive or advantage within the meaning of this subsection.' ... Mr. Jones."

Mr. Jones: "It permits the people from getting this exemption to sell at retail in our wineries."

Chairman: "Is there objection to the amendment? Without objection; show that done. Now, we have a lengthy amendment on page 4, lines 3 through 25. Insert the lengthy amendment."

Mr. Jones: "This is a sliding scale so that, if you see a significant increase of sales as a result of this exemption, you will notice that the exemption phases out as your gallonage increases. So it's to protect us, in putting this legislation into effect, that we have this sliding scale and I'd urge adoption."

Chairman: "Okay - any questions? Any objections? Without objection; show that amendment adopted. Now, we are on page 5, lines 17 through 26, and on page 6, line 2. Page 5, lines 17 through 26 strike 'or 11b'; in page 6 line 2,

strike '11b' and insert 'b, c, or d.' Mr. Jones, you are recognized."

Mr. Jones: "Rather than lumping these types of wines together, we have three different categories: 14%, above that, and sparkling; and that's all we are doing here, so that's better identification."

Chairman: "Any objection? Without objection; show that amendment adopted. Now, on page 5, line 19, strike after period lines 19 through 22 and 23, and insert the following language: 'the division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.' "

Mr. Jones: "This permits the Division to adopt the rules. Move the amendment."

Chairman: "Any objection? Without objection; show that done. Now the technical amendment. Without objection; show that technical amendment adopted. And then a title amendment, show the title amendment adopted without objection, and another title amendment adopted without objection. Now we are on the bill as amended. Is there debate? Mr. Hargrid, you want to debate it again?"

Mr. Hargrid: "Same speech: good bill."

Chairman: "Okay, Mr. Jones moves, Committee Substitute for Committee Substitute for House Bill 530 as Committee Substitute. Call the Roll. Yes, Mr. Jones."

Mr. Jones: "Mr. Chairman, staff tells me that we have a scrivener's error in the amendment on page 4,

lines 3 through 25. We've inserted '225' and it should be '250'."

Staff-person: "Underneath it should be '250'."

Mr. Jones: "A different item there, where it says '3,250,000'? Insert '250'; they simply left it out."

Chairman: "I can't find it."

Mr. Jones: "Second page."

Chairman: "Where it's [sic] says what now?"

Mr. Jones: "3,350,000."

Chairman: : [sic]Which should be -- "

Mr. Jones: "250."

Chairman: "Is there objection to the technical amendment to the amendment? No objection; we'll show that done. Now, we are on the bill as amended and as debated. Call the roll."

[The roll is called.]

Chairman: "The bill passes."

Nothing else pertaining to the beverage bills is on the tape past this point.

Exhibit D

FLORIDA SENATE
Commerce Committee
May 9, 1985
(Tape Transcript)

Thank you Mr. Chairman. Member of the Committee - Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. We have an amendment that has been worked out and already passed through the Regulated Industries Committee in the House and the Finance and Tax Committee and I think it takes care of any concerns you might have."

Chairman: The Bill is now before ... do you want to tell us what it does?

Sen. Crawford: Mr. Chairman, Members of the Committee - this is a tax exemption that was first given in 1963 that basically created an industry in this State - it created one in Polk County that we are very grateful for. It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State. In the amendment we have basically capped the exemption for the fiscal impact to the State so that it in my opinion guarantees that it is no more than the status quo and in fact, at best, maybe in fact raise[sic] some more money for the State.

Chairman: OK, are there any questions? If not, there are two people to speak. Larry Williams speaking for the Distilled Spirits Council.

Larry Williams: Thank you Mr. Chairman and Members of the Committee. I'm Larry Williams representing the liquor distillers. The concept of what you are being asked to do today is worthy because years ago when the exemption was given, it was given under the pretense that what we wanted to do was sell Florida products. We wanted to encourage the use of Florida products in the making of alcoholic beverages and we gave a tax break for that very reason. The only problem is and some of these people are also members of mine, is the Supreme Court of the United States said that you can't do that. That you can't impede the free flow of goods, you can't interfere with the Commerce Clause just because you're trying to use the products of your state. In order to try to circumvent that *Bacchus* decision which clearly makes Florida statute probably unconstitutional, this Bill was drafted to try to get around the arguments so the only way to do that was to strike the language relating to Florida products. So if you look at the Bill we don't speak of Florida products any more. We say products from anywhere. If you make them in Georgia any place that does not have a preferential tax or an incentive in that state would qualify in Florida. So the big question is from an appropriations standpoint, you don't know how - what the impact on Florida dollars are going to be. You don't know how many people are going to qualify for this tax exemption under the bill that you're looking at today. So there may be a short-fall from the revenues there. The big problem for us is that if we had to bring suit

challenging the constitutionality of the statute if this one were passed or if the existing statute stays on the the books it puts us in the same situation as with the aviation fuel tax. We have to sue saying okay you have overcollected the tax for the last two or three years and in this case a 30% break would amount to $50,000,000 a year so we would have to sue saying we won't refund the past three years of taxes and we just don't know what the liability to the State is. The point is in an effort to save a few jobs -- which we don't know for sure that those jobs would be in jeopardy - you being asked to jeopardize millions of state dollars. And I know what we're trying to get to, we're trying the issues you have been asked to evaluate here is illegitimate and the problem we're having is... you can love a child and you can adopt a child. It is very hard though to make it legitimate and that's what this bill tries to do and I urge you vote against it. The concept is noteworthy and there might be ways that you can help Polk County and those distilleries down there but I believe this is not the appropriate way to do it. I urge you to vote against it.

Chairman: Do other states have an exemption?

Mr. Williams: Yes. There are several. Since the Supreme Court recent case in Hawaii - a Hawaii case which came out in 1984 immediately when it came out Hawaii went to try to and they went to session the next day to try to change their statute. There are several states that are not required by the legislative process to change them and the Attorney Generals had gone and changed the statutes. There are lawsuits pending in Georgia and many other states on this same

issue. That's our whole point. It's hard from a manufacturer's standpoint when we have to deal with the legislature to come in and be forced to have to take you to court to find out if it ...

Chairman: [Question inaudible] My understanding is that other states aren't having any problem with this decision because they're not enforcing it.

Mr. Williams: No sir, that's not correct. Only a week or two ago there was suit brought in Georgia by Heublein - on this very point that I have raised. Kentucky -

[Question]: Is Georgia continuing in exempting their home-grown products.

Mr. Williams: What Georgia did, because they were very concerned about this whole issue and the folks favoring it were formidable as they are here and they passed two bills - they passed the preferential bill and they passed the bill similar to Senator Grant's bill to repeal it. They passed both bills and the Governor signed one first and the other second, so that they wouldn't have to come back and do it after the lawsuit - Not that that makes any sense. But to answer your question about what states - Kentucky is a big distilling state and they do not have - a lot of your big distilling states don't have preferential treatment and if there is no preferential treatment in Kentucky, a big distilling state, and they decide to come down and use some of the products or the by-products that are enumerated in the bill and take advantage of Florida's cheaper taxes there is nothing that Florida can do.

[Question] In Kentucky they don't have any preferential ...?

Mr. Williams: It is my understanding in three of the larger distilling states that they don't and that's Kentucky, Indiana, Illinois. [inaudible question] That was my information.

Chairman: The next speaker is Mr. Howard Rasmussen.

Mr. Rasmussen: Mr. Chairman, Members of the Committee, I am Howard Rasmussen, Director of the division of Alcoholic Beverages and Tobacco. We are not unsympathetic to the purpose and intent of this particular bill and the second bill also for consideration of wine. Our concern is, however, that we do not feel the language in each of these bills, but particularly this one on distilled spirits, accomplishes the objective that is set forth. As I said we are not unsympathetic to that objective. We do not think this particular proposed bill accomplishes that. For example, the bill opens the can of worms to a number of products from other states and those products and their manufacturers and distillers could be exempt from Florida taxes at the same rate as people using Florida products and that could open a potential can of worms for us and cause a problem in terms of the decline of state revenue based upon that tax.

For example, one of the unknowns is Bacardi in terms of use of their products for the production of rum. Would this particular piece of legislation provide a tax exemption to Bacardi? Would it provide a tax exemption to other distilleries outside the State of Florida? That's the unknown. We are uncertain and what the statute as Senator McPherson has indicated might be today in Kentucky that could change tomorrow

and then we would have to grant that exemption. We have a concern about the resources necessary to keep track of the exemptions in all fifty states. We have a concern about being able to evaluate the content of the product to make sure that the product complies with the language in this statute. We're concerned about the state resources necessary to conduct the investigation to determine whether they are in compliance with this statute and should we deny an application for an in-state or out-of-state licensee, we're concerned about the impact upon the state to prove our case in either a hearing or in a court of law. We think it's an extremely complicated bill, we lack the kinds of information that is necessary from the other 50 states. That lack would continue should this bill be passed and we think there's [sic] some real problems with the State of Florida. Senator McPherson?

Sen. McPherson: What troubles me is the fact that you're going to testify against the bill in court. If you all hadn't sent our your memo that you were going to start enforcing it and just ignored it, the status quo would have happened. You've caused the situation and now you're testifying against it.

Mr. Rasmussen: Senator McPherson, I didn't cause the problem -- the United States Supreme Court caused it. It was the opinion of the lawyers and the people ... before we sent that memo out, Senator, we contacted the House, we contacted the Senate, we contacted the Governor's Office. That was not done unilaterally by the Division. It was done after contacting other states, it was done after talking with Hawaii and we felt to protect Florida revenue, we had to send that memo out because other wholesalers and

distillers and wineries were threatening us with a lawsuit that could have...

Sen. McPherson: But by your action, if we passed this, you're going to open the door even wider. I find that kind of irresponsible.

Chairman: Any other questions? If not, Senator Crawford, do you want to be heard?

Sen. Crawford: Just very quickly in response, as I mentioned before there's a formula cap in this bill that protects this state against any further loss other than the status quo. As far as enforcement, I'd be glad to work with the Department and make sure they have the adequate resources and I think that you'll find that it is going to be very easy enforcing the status quo and that's what this bill does.

Chairman: Any further discussion on the bill?

Sen. Grant: Mr. Chairman

Chairman: Yes, Senator Grant.

Sen. Grant: I think I get the sense the committee ... I know someone said, I think it was Senator Crawford, it is a very complicated issue [inaudible] I think the bill will have a lot to do with the [inaudible]. I want to point out that there is a bill offered that is in direct competition to Senator Crawford's bill.

Chairman: Any further discussion?

Sen. Deritani[?]: Isn't the bottom line on this that if you want these businesses to move to Florida and we have

a better base here then we want to vote for Senator Crawford's bill. If you want to help the out of state people then you want to vote against this bill and if you want to discourage them from moving to Florida there seems like there should be a lot of people that are on the verge of moving to Florida and if we can just maintain what we have it might bring them in and it seems to me that it's a good bill.

[question re preferential treatment inaudible]

Sen. McPherson: Senator Crawford, doesn't your bill provide for a proviso if another state has the preferential treatment for products that they can't use Florida's preferential treatment ... It's obvious.

Sen. Crawford: That's correct.

Sen. McPherson: And almost every state has this provision so no one [inaudible].

Senator _____: That's not the question I'm asking though. I want to make you understand the question I'm asking. In order to encourage the use of Florida citrus or Florida cane - Florida other home grown products, we gave this exemption and therefore we're getting that revenue. [inaudible] But if this bill passes it would be no prohibition on bringing in products, the same products, such as maybe citrus and sugar cane or whatever else from another state that produces that and the producing party [inaudible] that product.

Chairman: Senator, I think Senator McPherson hit that question fairly squarely that if that company who would like to use other citrus products that may not be produced in Florida they would not get

this exemption if in fact they enjoy an exemption in that state where they're doing it which in that case it's probably true. I think the distinction here, Senator Giardo [?], is the distinction between theory and reality and what this bill does is deal with reality and the reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important. But most importantly is that reality or theory, we have protected the state's revenues and that's the most import thing and in drafting the bill the way we have we achieve exactly what we want to do and the State remains in good shape and we keep the job. So I think your concern is cured by the way we've drafted this bill.

Sen. McPherson: One more thing on that. I think Senator Crawford has probably accurately stated the reality of the situation. The reality of this bill is that except for the people that are employed at the distilleries and probably no one else really cares except the owners and the other distributors in the state. The battle of interests, I guess you could make some argument that there are jobs being produced by the distillers. There are also jobs being produced by those that are distributors of the state. So it is that issue. I don't think there'd be a person on this Committee that would have opposed the bill because we were trying to bring jobs to Polk County. The problem with the bill was, or the

law was, that it had the word "Florida" in front of it. It said you can use only Florida made products and the Supreme Court said you can't do that -- this was not constitutional, so you've got to take out that word "Florida". What Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that - the real point is that here we're in jeopardy I think of losing about, I guess it's about 3.9 billion [sic] dollars in revenue to the State. That's what the exemption will do - continue that loss of revenue to the State. There have been threats of suits by the distributors and I think that may or may not be appropriate for this discussion. It probably is not. But just so you know where we are, we're talking about giving a additional 3.9 billion [sic] dollar exemption to two or three particular distillers in this state so that they could continue to operate. And those who have opposed this concept are doing so because they say "Look, we bring jobs into the state too and we supply a lot of money for the state and we aren't being treated fairly." That's what the issue is. So I would say if you wanted to continue the exemption to Senator Crawford's district, which is _____, Senator Crawford that you would give this 3.9 million dollar exemption to that distiller and one other down state. That would be the [sic] for you to do, to vote for this bill. If you all want to do that, you'll have to increase revenues to the State of Florida, the general revenue by 3.9 million dollars [inaudible].

Sen. McPhearson: Senator Grant, until about 48 hours ago [inaudible] And two or three things did occur.

One, we're not giving something we don't have because we don't have the 3.9 million dollars today. We're not collecting it so we're not giving anything up. It continues the status quo. The thing that cured me was when I found out that they had so artfully drafted this piece of legislation [inaudible] California would and all these people would chip in and take advantage [inaudible]. The way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida. Thank you.

All in favor of the bill, please say "Aye." Aye. All opposed, "no." No. The bill is passed.

Chairman: We'll take up the next bill. Bill 569. The Committee substitute which is being handed out, is this similar to the House bill?

[Speaker] Yes, Mr. Chairman, I'd like to move committee substitute on that last bill, as well.

Chairman: That motion adopted without objection.

[Speaker] The first bill we had dealt with distilled spirits, this deals with wine and it's exactly the same concept. We're applying the same concept in the current status quo maintaining it for the production of wine.

Chairman: Is there anyone here to give testimony on this bill? Does anyone on the committee want to

speak on the bill? I think it is the same concept. Senator McPhearson move the bill. All those in favor of the bill say "Aye." Aye. All opposed, "no." Show the bill adopted. That's it, thank you.

EXHIBIT E

FLORIDA SENATE
Finance and Taxation Committee
May 14, 1985
(Tape Transcript)

Discussion of SB 425: Tax exemption on liquor

Chairman,
Robert Crawford: This is a bill that was passed out of the commerce committee last week that in my opinion maintains the status quo on the current exemption that we have. It has created a distillery business in the state and I hope that it's not very controversial.

Sen. Bill Grant: I just wish someone would explain to me the difference between this production of alcohol and the other in the production of ethanol.

Senator Weinstein
(Vice Chairman): It's very simple, Senator Grant. With this kind of alcohol, you get tanked up. The other one you put in your tank.

Senator Grant: What I really was referring to is why did we T.P. one issue related to production of . . .

Chairman: I moved to T.P. because we were bogging down.

Senator Grant . . . alcohol and not on this one.

Chairman: Senator, to respond to your question, as you remember in the Commerce Committee, the

extent of discussion about that and Senator Grant had a different opinion about this, but I thought we got him satisfied back then, but there's a basic distinction in the type of taxation, type of production and currently the reason the exemption for gasohol is currently in effect. What I'm trying to do is keep the exemption for distilleries in effect. And what has happened in the Supreme Court in the *Bacchus* case is that has made a ruling that would tend to jeopardize our existing language, which has been on the books, because of the technical aspects of the *Bacchus* decision. What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that it's constitutional. So this question on this issue we have a constitutional problem which we are dealing with and the other question is simply a policy matter.

Senator Grant: Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of jobs, the continuation of use of Florida products without saying so because that was a constitutional issue. I think that it applies, and I thought that you and Senator Peterson introduced that bill which would have removed the exemption on gasohol but it's your bill too to continue this exemption. I wonder why we want to continue one exemption and remove another.

Chairman: What Senator Peterson and I were attempting to do on the other bill was to repeal the exemption as it exists, but offer some amendments here to committee that would benefit the Florida producers and that's what we have now. The difference is there's a disagreement on the

Florida producers as how we can proceed with the gasohol. Some of the Florida producers would like to have a production credit at the end of this year. Some would like us simply to go to the reciprocity route. So we have a division among their own people in this state as to how we should proceed on gasohol. As relates to the distillery issue, there is no disagreement and I think that . . . among the people who are benefiting [sic] from it. And so therefore there is that distinction. Certainly there may be some other . . .

Senator Grant: Well you see Senator you see I have some of that gasohol. Probably those creation of those jobs . . .. are just as important to me as they are to the people in Polk County or wherever. I think we're going to be inconsistent if we go ahead and pass this bill unless we pass them in tandem.

Sen. McPherson: I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

SB 569 Wine Exemption Discussion:

Chairman: This bill will take the same concept and it deals with wine. It reinstates the current exemption.

EXHIBIT F

FLORIDA SENATE
Floor Debate
May 30, 1985
(TRANSCRIPT)

President of the Senate: Senator Crawford are you ready on your bill? Senator Crawford do you just want to take up the House bill?

Crawford: Yes sir. Yes sir I would.

President: Which, which House bill do you want?

Crawford: O.K. let's see . . .

President: 521?

Crawford: I'm totally buried here, 521 sounds pretty good.

President: Read the House bill taken up in lieu of the Senate Bill. Show the necessary motions.

Clerk: Mr. President, I'm directed to inform the Senate that the House of Representatives has passed as amended committee substitute for committee substitute for committee substitute for House Bill 521 and requests concurrence of the Senate.

President: Senator Crawford . . .

Clerk: Committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: Senator Crawford to explain the bill.

Crawford: Mr. President, this is the distilled spirits bill that we are taking care of a constitutional glitch we had in the current law we are continuing the exact same level of exemption for these distilleries and I believe there's an amendment on the desk we need to take up. The House has assured me they'll take the bill. So we need a couple of amendments. Right. Okay thank you.

President: O.K. any, any amendments to the bill?

Clerk: By Senator Crawford on page 6, line 24 insert after calculations lengthy amendment.

Crawford: Mr. President, this is an amendment that puts another cap on top of all the caps we have got so everybody, even to the last second here, they got their last shot to make sure that it's absolutely capped and this does that.

President: Senator Crawford do you want to take that risk? Sending this bill back to the House?

Crawford: Mr. President they have promised me a blood oath that they will take it, so I'm taking them for their word.

President: Mr. Jones' blood?

Crawford: Mr. Jones' blood is at stake.

President: All right. Any objection to the amendment? Without objection. That is 83 bills they're going to take up in the next half an hour, you realize that?

Crawford: That's right.

President: O.K. Read the next amendment.

Clerk: By Senator Crawford, on page 7, line 3 strike new applicant and insert manufacturer or importer applying.

Crawford: O.K. That's the clarification amendment.

President: O.K. Without objection. Any further amendments?

Clerk: No further amendments.

President: Any debate? O.K. Senator Crawford moves that the rules be waived and House Bill 521 be read. Read it the second time.

Clerk: Committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: O.K. Senator Crawford moves that the rules be waived and House Bill 521 be read for a third time by title only and placed on final passage. Without objection read the bill.

Clerk: Committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: The Clerk will unlock the machine and Senators will vote. Have all Senators voted? The Clerk will lock the machine and announce the vote.

Clerk: 30 yeas, 2 nays, Mr. President.

President: The bill passes. Read the next bill.

Clerk: Senate Bill 569, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: O.K., Senator you want to take up House Bill 530?

Crawford: Yes, yes sir.

President: Show the necessary motions to take up House Bill 530 in lieu of Senate Bill 569. Without objection. Read the House Bill.

Clerk: Mr. President, I'm directed to inform the Senate that the House of Representatives has passed as amended committee substitute for House Bill 530 and requests concurrence of the Senate. Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: Read it again.

Clerk: Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: Senator Crawford to explain the bill.

Crawford: Mr. President, this is the same concept on the first one. This would apply to wine products, and we have one amendment on the desk.

President: Read, read the amendment.

Clerk: By Senator Crawford, on page 5, line 13, insert after wine, as described in subsection 2.

Crawford: Clarifying amendment.

President: Technical amendment without objection. Any further amendments?

Clerk: No further amendments.

President: Senator Crawford moves that the rules be waived and House Bill 530 be read a third time by title only and placed on final passage. Without objection. Read the bill.

Clerk: Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: The Clerk will unlock the machine and Senators will vote.

. . . .

President: Lock the machine.

Clerk: 30 yeas, 2 nays, Mr. President.

President: So the bill passes. Read the next bill.

EXHIBIT G

FLORIDA HOUSE OF REPRESENTATIVES
Floor Debate
May 28, 1985
(TRANSCRIPT)

Clerk: And now for the following title amendment on page 1, line 3.

Speaker: Title amendment without objection, choice of adoption, further amendments on the desk.

Clerk: None on the desk, Mr. Speaker.

Speaker: Representative Jones, for what purpose?

Jones: I'm ready for the two bills that we temporarily passed a while ago, if you could, Mr. Speaker.

Speaker: Would you direct our attention to exactly where they are.

Jones: Page, page 3, the top right hand column, committee subs for House Bill 521 and 530. These are the two Florida Products Bills, dealing with Spirits and Wine.

Speaker: Committee Substitute, uh, excuse me, House Bill 521 has already been read as I understand it for a second time . . . it hasn't been? Alright read it.

Clerk: By the Committee on Appropriations, committee substitute for committee substitute for committee substitute for House Bill 521. A bill to be entitled "An Act Relating to Alcoholic

Beverages," amending section 561.24 Florida Statutes, prohibiting the licensing of any . . .

Speaker: Representative Jones moves that the rules be waived and the committee substitute for House Bill 521 be read a second time. All those in favor of the motion say "Yea," all who oppose say "No." Show it adopted. Read it.

Clerk: By the Committee on Appropriations, committee substitute for committee substitute for committee substitute for House Bill 521. A bill to be entitled "An Act Relating to Alcoholic Beverages," amending section 561.24 Florida Statutes, prohibiting licensing of any manufacturer, rectifier or distiller as a distributor.

Speaker: Representative Jones to explain.

Jones: The State of Florida has granted a benefit to the distillers in Florida using Florida products for many years. The Supreme Court ruled on the issue and we're trying to protect an industry that we developed as a result of our economic development efforts here in Florida. There's 200 to 300 jobs that we're depending upon passage of this bill. Now I think that many of you are familiar with it because it has been through three major committees. I submit to you that this is not my area of expertise. I simply sponsor this legislation because it affects jobs in my district dramatically. You will notice that this is the third committee substitute. In each instance we have done what I have asked staff to do and that is to be sure that we are not expanding the exemption. We're simply trying to protect what was in place prior to this

Supreme Court decision. I want to express my appreciation to Regulated Industries staff, to Finance and Tax staff, Chris Weiss in particular, Mr. Chairman, and also the Appropriations Committee staff for getting this bill in proper form where there is a minimum fiscal impact and we retain Florida jobs. I move the bill. We do have some amendments on the desk, Mr. Speaker.

Speaker: Read the first amendment.

Clerk: Representative C. F. Jones offered the following amendment on page 6 lines 3 through 30, strike all of said lines and insert new subsection 5 and renumber subsequent.

Speaker: Representative Jones.

Jones: This is one more effort to tighten it further so that the schedule of exemptions is reported monthly and the State will know from the number of sales what the rate is and the revenue estimating committee can be kept up to date on a monthly basis. I move the amendment. A series. Move the amendment.

Speaker: Is there debate? Is there discussion? If not, the question recurs on the amendment as offered by Rep. Jones. All in favor say "Aye." Those opposed "No." Amendment passes. Read the next amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 7, line 3, strike after the word, between January 1st and January, and insert July 1st and July. Reading of the amendment Mr. Speaker.

Speaker: Representative Jones.

Jones: This is a date change which puts it in the proper perspective for what we are trying to accomplish with the previous amendments. Move the amendment, Mr. Chairman.

Speaker: Is there debate? Is there debate? If not the question recurs on adoption of the amendment as offered by Rep. Jones. All in favor signify by saying "Aye." Those opposed "Nay." Amendment is adopted. Read the next amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 7, line 4, strike division and insert department, Reading of the amendment . . .

Jones: Technical in nature. We wrote division and should of said department. Move the amendment.

Speaker: Technical amendment. Without objection, show it adopted. Are there further amendments?

Clerk: None on the desk, Mr. Speaker.

Jones: I move you to go to the third reading if we could, Mr. Speaker.

Speaker: Representative Jones moves that the rules be waived and committee substitute for House Bill 521 be read a third time. Is there objection? Without objection, read it.

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages," amending section 561.24 Florida Statutes. Prohibiting . . .

Speaker: So the question recurs in final passage, committee substitute for House Bill 521. The Clerk will unlock the machine and members will proceed to vote. Have all members voted? Have all members voted? Clerk will lock the machine and announce the vote.

Clerk: 83 Yeas, 3 Nays Mr. Speaker.

Speaker: So the bill passes.

Volusia County bill relating to consolidation: HB 1348

Speaker: Representative Jones, for what purpose?

Jones: I'd like to move committee sub 530, the wine bill, please, Mr. Speaker. We passed the liquor bill, we now need to move the wine bill.

Speaker: Take up, Representative Jones moves the House to take up House Bill 530. RRead it (sic)

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, to be entitled "An Act Relating to Alcoholic Beverages," amending sections 564 . . .

Jones: This is the bill I explained earlier, that deals with wine. We passed the hard liquor, I submit we

pass the wine bill. Move it . . . amendments on the desk, Mr. Speaker.

Speaker: Representative Jones first moves the rules be waived, committee substitute for House 530 be read for the second time by title. Without objection. Without objection, read it.

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

Speaker: Representative Jones.

Jones: This is the 12 months reporting amendment. Move it. The same amendment we put on the other bill. Move concurrence with the amendment.

Speaker: Is there discussion, is there debate? There being no debate, the question recurs, the amendment as offered by Representative Jones. All in favor signify by saying "Aye," opposed "No." Amendment passes.

Speaker: Read the amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 4 lines 13 through 31, page 5 lines 1 through 31 . . .

Speaker: So now the question recurs on the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No." Now the amendment passes. Read the next amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 7, line 5 after the word between, strike January 1 and January and insert July 1 . . .

Speaker: Representative Jones.

Jones: Annually will apply every six months and that means you'll get your money faster. Pass the amendment, please sir. Same one we had on the other bill.

Speaker: Is there debate, is there discussion? If not, the question recurs on the adoption of the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No."

Jones: "Aye."

Speaker: Thank you Mr. Jones. Further amendments?

Clerk: On the desk, Mr. Speaker.

Speaker: Read the amendment.

Clerk: Representative Jones offers the following amendment on page 7, line 9 insert new subsection 13, all revenue collected by above subsections 11 and 12 shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

Speaker: Representative Jones.

Jones: This annual fee will go directly to the Department so that it can take care of the funding

auditing and other items and reduces the fiscal note further. I move the amendment, Mr. Speaker.

Speaker: Is there discussion? Is there debate? If not, the question recurs on the adoption of the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No." Amendment is adopted. Representative Jones.

Jones: I don't think there are any other amendments.

Speaker: Wonderful.

Jones: May I move that we waive the rules and go to the third reading please.

Speaker: So you're saying there's a special reason we have to get that down there, O.K. Representative Jones moves that the rules be waived . . .

Jones: We have a Senate counterpart.

Speaker: . . . for committee substitute for House Bill 530 be read a third time by title. All those in favor signify by saying "Aye," opposed "No." Read it.

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages." Amending . . .

Speaker: Is there debate? Is there debate? If not, the question recurs on final passage of committee

substitute for House Bill 530. The Clerk will unlock the machine and members will proceed to vote. Have all members voted? Have all members voted? The Clerk will lock the machine and announce the vote.

Clerk: 102 Yeas, 2 Nays, Mr. Speaker.

FLORIDA HOUSE OF REPRESENTATIVES
Floor Debate
May 31, 1985
(TRANSCRIPT)

Mr. Speaker: The bill passes. Read the next message.

Reading Clerk: Also by the Committee on Appropriations, Finance and Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Burnsed, Committee Substitute for Committee . . .

Mr. Speaker: Representative Jones moves the rules be waived that we do now take up House Bill 521 instanter. All those in favor of the motion say "Yea" opposed "No". Show and adopted. Read it.

Reading Clerk: By the Committees on Appropriations, Finance and Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Burnsed, Committee Substitute for Committee Substitute for Committee Substitute for House Bill 521. A bill to be entitled An act relating to alcoholic beverages; amending Section 561 . . .

Mr. Speaker: Representative Jones to explain.

Rep. Jones: Members of the House this is the distilled liquors and 530 following this will be the wine bills for Florida products. I urge you to move it along by concurring in the two Senate amendments that we have on the desk. We will be ready to posture ourselves for passage.

Mr. Speaker: Representative Jones moves that we do now concur in the two Senate amendments? Is there debate on the two Senate amendments on the motion to concur in the two Senate amendments? Is there debate?

Rep. C.F. Jones: Mr. Speaker?

Mr. Speaker: "Yes."

Rep. C.F. Jones: On the second amendment it will read "manufacturer or importer." We had to write it by hand last night and I'm putting this in so that it will be understood properly. We had to add an "r" to manufacturer and then or importers. The Clerk is familiar to what I'm talking about. We're doing this for clarification. Move the amendments.

Mr. Speaker: Okay, is there further debate or questions in respect to the motion to concur in the two Senate amendments? Hearing none question recurs on the adoption of the motion. All those in favor say "Yea" and opposed "No." Show it adopted. Now we're on final passage of the bill. The Clerk will unlock the machine, the members will proceed to vote on Committee Substitute for House Bill 521. Have all members voted? Have all members voted? The Clerk will lock the machine and announce the vote.

Reading Clerk: 107 yeas, 3 nays, Mr. Speaker.

Mr. Speaker: So the bill passes. Representative Jones moves now rules be waived and that we do take up House Bill 530 instanter. All those in favor of that motion say "Yea," opposed "No." Show it adopted. Read it.

Reading Clerk: By the Committees on Appropriations, Finance Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Dantzler, Committee Substitute for Committee Substitute for Committee Substitute for House Bill 530. A bill to be entitled An act relating to alcoholic beverages; amending sections 564.06, Florida Statutes which exempts from taxation wines manufactured from certain. (sic)

Mr. Speaker: Representative Jones.

Rep. C.F. Jones: Mr. Speaker, this is the wine bill. I move you sir, that we concur in the one Senate

Mr. Speaker: Okay, Representative Jones moves that we do concur in the Senate amendment.

Rep. C.F. Jones: This is the Florida wine . . . Helen. Bless your heart.

Mr. Speaker: Is there debate on the motion to concur? Debate or questions in respect to the motion to concur? Hearing none the question recurs on the adoption of the motion. All those in favor say "Yea" all opposed say "No." Show it adopted. Now we're on final passage of Committee Substitute for House Bill 530. The Clerk will unlock the machine and the members will proceed to vote. Have all members voted? Have all members voted? Clerk will lock the machine and announce the vote.

Reading Clerk: 114 yeas, 1 nay, Mr. Speaker.

Mr. Speaker: The bill passes.

EXHIBIT H

LEGISLATION ANALYSIS

CS/CS/CS
HB 521 Date Received 6-11-85 Date Due ASAP

SB _____ Agency Affected Dept. of Business Regulation

Approp., F&T, Regulated Ind.,
Sponsor(s) Sen. C.F. Jones/ Others Effective Date July 1, 1985

BRIEF:

The bill provides for an exemption or reduced beverage tax rate for liquors and specified alcoholic beverages of which the distilled spirits are manufactured exclusively from citrus byproducts, citrus byproducts(sic), sugarcane, or sugarcane byproducts.

The first category consists of alcoholic beverages except wines containing 14 to 48 percent alcohol by weight and the second category more than 48 percent alcohol.

During July and August of each year the first category beverages are taxed at $6.50 per gallon and second category beverages at $9.53 per gallon. Commencing August 20th and each month thereafter the Department of Business Regulation determines the tax rate applicable in the subsequent month as follows: first, the percentage change in the sales of alcoholic beverage in each category is calculated, prior month's gallonage over the same month the prior year. If the gallonage has increased, the tax rate is increased by the percentage increase in gallonage in excess of five percent. If the gallonage has decreased, the tax rate is reduced by the percentage decrease in excess of five percent. However, in no case shall the tax rate for beverages 14 to 48 percent alcohol fall below $4.35 or rise above $6.50 per gallon and the tax rate for beverages above 48 percent shall not fall below $4.95 nor rise above $9.53 per gallon.

Paragraph (c) of Subsection 565.12(1) is created providing that the exemptions shall not apply to alcoholic beverages manufactured in states or countries which impose discriminatory taxes on beverages manufactured outside their boundaries, or which provide agricultural price supports, other economic incentives, or export subsidies for domestically produced alcoholic beverages.

The bill provides that any manufacturer or importer applying for the reduced special products tax rate shall pay an application fee of $5,000 each year and a license fee of $3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Application and license fee revenues shall go directly to the Department of Business Regulation to administer the provisions of this act. The manufacturer is also required to pay travel expenses of the Department to audit the manufacturer's records.

Section 565.055, Florida Statutes, is created providing that no distilled spirits greater than 153 proof shall be sold, processed or consumed in the state.

Legislative Analysis - CS/CS/CSH3521 - Page Two - June 18, 1985
FISCAL IMPACT: FY 1985-86: $1.6 mil. FY 1986-87: $1.2 mil.

POLICY: This bill preserves a long standing tax incentive to produce liquor from Florida citrus and sugar cane by-products. Because of a recent U.S. Supreme Court ruling (Bacchus v. Diaz (sic)) the Florida preference provisions of Chapter 565, F.S., as currently written, are probably not constitutional. The matter is currently in litigation at the circuit court level. This bill would preserve this tax preference. The tax loss from this bill is smaller than the loss under existing law. The anticipated losses under current law are $3.9 million in FY 1985-86 and $4.0 million 1986-87.

In general it has been the policy of this administration to be skeptical of large tax breaks as a means of promoting economic development. However, the administration has proposed or been party to numerous small tax reductions ($1 million - $5 million) in the name of economic development and diversification. Thus, the undeclared but de facto policy appears to be that the investment of small tax breaks for economic development is justifiable. House Bill 521 is consistent with this policy.

RECOMMENDED ACTION:

1. Sign into Law without ceremony _____
2. Sign into Law with ceremony _____
3. Law without Governor's signature XX
4. Veto _____

STAFF /s/Edward Montanaro DATE: June 18, 1985
Edward Montanaro

LEGISLATION ANALYSIS

CS/CS/CS
HB 530 Date Received 6-11-85 Date Due ASAP

SB _____ Agency Affected Dept. of Business Regulation

Appropriation, F&T, Regulated Ind.,
Sponsor(s) Sen. C.F. Jones/ Others Effective Date July 1, 1985

BRIEF:

The bill establishes a beverage tax exemption for wines manufactured from citrus fruits and certain species of grapes. However, the tax rate is adjusted monthly based upon the volume sold in the previous month. A sufficiently large volume can cause the tax rate to increase to the general tax rate for that type of product.

Section 1 of the bill amends s. 564.06, F.S., to exempt wine of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis sbsp. simponi, Vitus aestivalis sbsp. Smalliana, Vitis shuttleworthii, Vitis munsoniana, or Vitis berlandieri from the standard beverage taxes. Subsection (9) of s. 564.06 is created providing that the exemptions shall not apply to alcoholic beverages manufactured in states or countries which impose discriminatory taxes on beverages manufactured outside their boundaries, or which provide agricultural price supports, other economic incentives, or export subsidies for domestically produced alcoholic beverages.

In lieu of the standard tax rates of $2.25, (less than 14% alcohol) $3.00 (greater than 14% alcohol) and $3.50 (sparkling wines) the bill establishes variable tax rates to be adjusted monthly based upon prior month's sales. During July and August of each year the standard rates prevail. Commencing in August the rate applicable in September is based upon July's sales. For wine less than 14% alcohol, twelve possible rates are established corresponding to different sales volumes. Higher volumes result in higher tax rates. Sales above

gallons trigger the standard rate of $2.25. Wines over 14% alcohol are adjusted monthly based upon a schedule of two intervals, with a minimum rate of $1.50 and the standard rate of $3.00 applicable when sales exceed 12,500 gallons. Sparkling wines are adjusted monthly based upon a five-tiered schedule ranging from a minimum rate of $1.50 to the maximum rate of $3.50 triggered by a sales volume exceeding 8,000 gallons. Wine coolers, defined as a combination of carbonated water, flavors, and/or fruit juices containing 1 to 6 percent alcohol, are taxed according to two schedules, one for the higher consumption warm weather period (March through August) and another for winter. The rate is also adjusted monthly and varies from zero to $2.25.

The bill requires an annual application fee of $3,000 for each applicant for the special product tax reduction or exemption. Each manufacturer of qualifying special products must pay an annual license fee of $1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. The bill provides that the application and license fees shall go directly to Business Regulation to administer the provisions of the act.

FISCAL IMPACT: FY 1985-86: 0.5 million FY 1986-87: 0

POLICY: This bill preserves a tax incentive, proposed by Governor Graham to produce wine from Florida grapes and citrus products. Because of a recent U.S. Supreme Court ruling (Bacchus v. Diaz (sic)) the Florida preference provisions of Chapter 564, F.S., as currently written, are probably not constitutional. The matter is currently in litigation at the circuit court level. This bill would preserve this tax preference. The tax loss from this bill is smaller than the loss under existing law. The anticipated losses under current law are $0.8 million in FY 1985-86 and $0.9 million in 1986-87.

In general it has been the policy of this administration to be skeptical of large tax breaks as a means of promoting economic development. However, the administration has proposed or been party to numerous small tax reductions ($1 million - $5 million) in the name of economic development and diversification. Thus, the undeclared but de facto policy appears to be that the investment of small tax breaks for economic development is justifiable. House Bill 530 is consistent with this policy.

RECOMMENDED ACTION:

1. Sign into Law without ceremony. ____
2. Sign into Law with ceremony ____
3. Law without Governor's signature XX
4. Veto ____

STAFF /s/Edward Montanaro DATE: June 18, 1985
Edward Montanaro

EXHIBIT I

STATE OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32301

Bob Graham, Governor
Gary R. Rutledge, Secretary

June 5, 1985

MEMORANDUM

TO: Gene Adams, Legislative Counsel

FROM: Richard B. Burroughs, Jr., Secretary

RE: CS / CS / CS 521

The Department has reviewed the above referenced bill and recommends that the Governor veto the legislation.

The legislation replaces what was formally know as the Florida products exemption from alcoholic beverage taxes for beverages manufactured and bottled in Florida from Florida grown products. The constitutionality of the Florida products exemption was cast in doubt by decision of the United States Supreme Court in a case styled *Bacchus v. Dias*, which ruled that states could not constitutionally enact legislation which favorably taxed only domestically produced and bottled alcoholic beverages.

The former Florida products exemption relative to distilled spirits provided a reduced tax rate for beverage distilled and bottled in Florida from Florida products. The above captioned legislation would repeal

the old language and provide in its stead reduced taxation on any alcoholic beverages made from citrus products or sugarcane or sugarcane by-products regardless of where produced. It further provides, however, that such exemption cannot be granted to alcoholic beverages manufactured in any state, territory or country which imposes discriminatory taxes on non-domestically produced alcoholic beverages or which provides agricultural price supports or other economic incentives or advantages exclusively for its domestically produced alcoholic beverages or provides export subsidies for the agricultural products used in making the alcoholic beverages.

It has been represented that such exeptions insure that no manufactuer outside of Florida can qulaify for the exemption, thereby providing the discriminatory effect to such legislation condemned by the United States Supreme Court in *Bacchus v. Dias*.

The Governor had previously advised representatives of the Florida manufacturers that he would not approve any replacement legislation for the Florida products exemption statute unless it met three criteria, (1) that it would be revenue neutral, (2) that it satisfactorily protected state revenues in the event out-of-state producers successfully challenged the constitutionality of the legislation and claimed entitlement to refunds based on the difference between the full rate of taxation and the reduced rate of taxation, and (3) that it provided adequate funding to the Department of Business Regulation for administration of the revised taxing scheme.

The above captioned bill clearly does not meet the guidelines set by the Governor. No provision whatsoever is made in the statute for protecting or indemnifying the state in the event of a refund action by out-of-state producers. While language is included saying that certain annual fees to be paid by producers qualifying for the exemption will go to the Department for administration of the act, no actual appropriation of money or positions is provided in such bill or in the

appropriations act, thereby seriously imparing the Department's ability to administer the complex provisions of this act. Finally, the act does not appear to be revenue neutral.

The legislation also provides that no distilled spirits greater than 153 proof "shall be sold, *processed* or consumed in the state". Manufacturers and bottlers of distilled spirits in this state, particularly Bacardi, process distilled spirits in excess of 153 proof as a necessary part of making a finished product for sale to consumers that will be well below the 153 proof requirement. While the prohibition against selling or consuming alcoholic beverages in excess of 153 proof may have a valid purpose, the prohibition against "processing" such distilled spirits appears to be solely intended to forbid certain Florida

businesses from continuing to pursue the legitimate activity of processing distilled alcoholic beverages into a final product that would be substantially below 153 proof. The act would force such businesses to relocate elsewhere with a corresponding loss of employment and tax revenues to Florida.

Finally, the constitutionality of this legislation remains substantially in doubt. The United States Supreme Court in a case styled *Metropolitan Life Insurance Company* v. *Ward*, 53 LW 4399 (1985), held that an Alabama gross premiums tax on out-of-state insurance companies which tax was at a greater rate than domestic insurance companies was unconstitutional. In so ruling the Court noted that the legislation did not contain any provision by which the foreign insurers could eleminate (sic) the discriminatory effect between in-state and out-of-state companies.

The above captioned bill suffers from the same infirmity in that it provides a greater tax rate for alcoholic beverage produced out-of-state without the ability for such out-of-state producer to eliminate the disparity in tax. Indeed, since this legislation would deny the

favorable tax rate where another state, territory or country provides export subsidies or economic incentives to agricultural products used in making the alcoholic beverages or where such other juridiction's legislature imposes a discriminatory tax, the out-of-state producer would be wholly unable to take any independent action to qualify for the reduced tax.

Out-of-state producers have strongly pushed for full implementation of the *Bacchus* decision in the removal of discriminatory state alcoholic beverage taxing statutes. The Division currently has two refund requests totaling (sic) $70,000,000.00 because of the discriminatory aspect of the current Florida products tax structure. This legislation will only further aggravate the situation by continuing a discriminatory tax through a costly and administratively complex taxing scheme.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

RBB:HP:js

STATE OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32301

Bob Graham, Governor
Gary R. Rutledge, Secretary

June 5, 1985

MEMORANDUM

TO: Gene Adams

FROM: Richard B. Burroughs, Jr., Secretary

RE: CS / CS / CS HB 530

The Department has reviewed the above captioned legislation and would recommend that the Governor veto this bill for the following reasons:

This legislation replaces what was formerly know as the Florida products exemption from alcoholic beverage taxes for wines manufactured and bottled in Florida from Florida grown products. The constitutionality of the Florida products exemption was cast in doubt by decision of the United States Supreme Court in a case styled *Bacchus v. Dias*, which ruled that states could not constitutionally enact legislation which favorably taxed only domestically produced and bottled alcoholic beverages.

The former Florida products exemption relative to wine provided a complete exemption from taxation for such beverages when manufactured and bottled in Florida from Florida products. The above captioned legislation would repeal the old language and provide instead a tax exemption or reduced tax on alcoholic beverages made

citrus, sugarcane (for alcoholic beverage products from 1 to 14 percent alcohol) and from certain defined species of grapes. The legislation further provides, however, that such exemption or reduced tax may not be granted to alcoholic beverages manufactured in any state, territory or country which imposes discriminatory taxes on non-domestically produced alcoholic beverages or which provides agricultural price supports or other economic incentives or advantages exclusively for its domestically produced alcoholic beverages or provides export

subsidies for the agricultural products used in making the alcoholic beverages.

It was represented during legislative committee hearings that such exceptions insure that no manufactuer outside of Florida can qualify for the exemption, thereby providing the discriminatory effect to such legislation condemned by the United States Supreme Court in *Bacchus v. Dias*.

The Governor had previously advised representatives of the Florida manufacturers who supported this legislation that he would not approve any replacement legislation for the Florida products exemption statute unless it met three criteria, (1) that it would be revenue neutral, (2) that it satisfactorily protected state revenues in the event out-of-state producers successfully challenged the constitutionality of the legislation and claimed entitlement to refunds based on the difference between the full rate of taxation and the exemption or reduced rate of taxation, and (3) that the legislation provided adequate funding to the Department of Business Regulation for administration of the revised taxing scheme.

The above captioned bill clearly does not meet the guidelines set by the Governor. No provision whatsoever is made in the statute for protecting or indemnifying the state in the event of a refund action by

out-of-state producers. While language is included saying that certain license fees to be paid by benefiting (sic) manufacturers will go to the Department for administration of the act, no actual appropriation of money or positions is provided in such bill or in the appropriations act, thereby seriously impairing the Department's ability to administer the complex and administratively costly provisions of this act. Finally, the act does not appear to be revenue neutral.

The legislation also contains specific provisions concerning the sale of wine coolers. Such non-Florida product is currently taxed at the rate of $2.25 per gallon. The legislation would substitute a rather complex taxing scheme in which tax rates are computed monthly based on the gallonage

Gene Adams
June 5, 1985
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sold during the prior month with differing tax tables, one for the prime sales months of March through August and one for the months of September through February. The tax table for the months of March through August provides that if the prior month's sales were between 0 and 250,000 gallons the tax rate will be 40 cents. It is currently predicted by both the Department and industry that between 2 and 2.2 million gallons of wine cooler product will be sold during the coming fiscal year. This would mean an average of approximately 180,000 gallons a month thereby resulting in a 40 cent per gallon tax rate during March through August and $1.40 tax rate during September through February. This would result in a very substantial revenue loss from the current $2.25 per gallon tax. Further, sales of this product will most likely result in a decrease in the sale of other alcoholic beverages thereby creating a further but uncertain potential for revenue loss. The Department does not perceive any good and sufficient justification for this tax reduction which will simply result in greater profits and competitive edges to manufacturers and distributors at the expense of state revenues.

Finally, the constitutionality of this legislation remains substantially in doubt. The United States Supreme Court in a case styled *Metropolitan Life Insurance Company v. Ward*, 53 LW 4399 (1985), held that an Alabama gross premiums tax on out-of state insurance companies which tax was at a grreater rate than domestic insurance companies was unconstitutional. In so ruling the Court noted that the legislation did not contain any provision by which the foreign insurers could eliminate the discriminatory effect between in-state and out-of-state companies.

The above captioned bill suffers from the same infirmity in that it provides a greater tax rate for alcoholic beverages produced out-of-state without the ability for such out-of-state producer to eliminate the disparity in tax. Indeed, since this legislation would deny the favorable tax rate where another state, territory or country provides export subsidies or economic incentives to agricultural products used in making the alcoholic beverages or where such other jurisdiction's legislature imposes a discriminatory tax, the out-of-state producer would be wholly unable to take any independent action to qualify for the reduced tax.

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Out-of-state producers have strongly pushed for full implementation of the Bacchus decision through the removal of discriminatory state alcoholic beverage taxing statutes. The Division currently has two refund requests totaling $70,000,000.00 because of the discriminatory aspect of the current Florida products tax structure. This legislation will only further aggravate the situration by continuing a discriminatory tax through a costly and administratively complex taxing scheme.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

RBB:HP:js

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM IN SUPPORT OF ITS REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE OF OFFICIAL ACTIONS OF FLORIDA LEGISLATIVE AND EXECUTIVE DEPARTMENTS

Plaintiff McKesson Corporation ("McKesson") has filed motions for partial summary judgment and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985), under the federal constitution.

McKesson submits this memorandum in support of its request that this Court, in connection with its consideration of the motions, take judicial notice of records of official actions of legislative and executive departments, which constitute legislative history of the Florida statutes. The United States Supreme Court's pronouncements concerning constitutional challenges to state statutes under the federal constitution's Commerce Clause require this Court to take judicial notice in order to determine the Florida legislature's true purpose in enacting the Florida statutes. Florida law also permits this Court's analysis of the statutes' legislative history.

I. UNDER THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE CONSTITUTION'S COMMERCE CLAUSE, THIS COURT MUST JUDICIALLY NOTICE THE FLORIDA STATUTES' LEGISLATIVE HISTORY IN ORDER TO DETERMINE THE STATUTES' PURPOSE

In numerous decisions concerning constitutional challenges to state statutes under the federal constitution's Commerce Clause, the United States Supreme Court has directed courts to examine challenged statutes for economic protectionism, which is virtually *per se* invalid under the United States Constitution's Commerce Clause. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Thus, in this case, this Court must examine the Florida statutes for either a discriminatory purpose or a discriminatory effect. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Philadelphia v. New Jersey*, 437 U.S. at 626. The legislative history of the Florida statutes palpably reveals the Florida legislature's protectionist purpose in enacting the tax scheme and is, therefore, critically relevant to this Court's determination of the constitutionality of the challenged law.[1]

The United State Supreme Court, in reviewing challenges to state statutes on Commerce Clause grounds, has focused on legislative history to identify the state legislature's intent. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds). The Court similarly has focused on legislative history in numerous other cases to find

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[1] McKesson is not invoking legislative history to illuminate the statutes' construction, but rather to reveal the legislature's purpose in enacting the challenged statutes. *Compare Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879, 882 (Fla. 1983).

expressions of legislative intent. *See, e.g., Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking [sic] body, minutes of its meetings, or reports" may show discriminatory purpose); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-461 (1974) (legislative history provides clear expression of legislative purpose).

Moreover, the Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the Florida statutes' language appeared non-discriminatory, this Court would need to explore the legislative history to determine the legislature's true purpose. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977) (citing to legislative history, including a governor's statements, to establish legislative purpose); *cf. Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 266-68 (1977) (referring to legislative history as a source a court should use to determine whether an ostensibly neutral statute is racially discriminatory).

Thus, as a matter of federal constitutional law, this Court must consider the Florida statutes' legislative history to determine the Florida legislature's true purpose in enacting the statutes.

II. UNDER FLORIDA LAW, THIS COURT MAY JUDICIALLY NOTICE THE FLORIDA STATUTES' LEGISLATIVE HISTORY

If the United States Supreme Court's decisions did not require this Court to review the Florida statutes' legislative history, Florida law would still suggest an analysis of the legislative history. Florida courts also have reviewed legislative history to determine legislative purpose. *See, e.g., Florida v. Webb*, 398 So.2d 820, 824 (Fla. 1981) (legislative history must be considered in determining legislative intent); *E.M. Watkins & Co. v. Board of Regents*,

414 So.2d 583, 587 (Fla. Dist. Ct. App. 1982) (legislative committee hearings are "strongly indicative of the legislative intent in enacting [a] statute"); *Speights v. Florida*, 414 So.2d 574, 576 (Fla. Dist. Ct. App. 1982) (tracing the legislative history of an act is relevant in discerning the legislative intent); *Fort Lauderdale v. Taxi, Inc.*, 247 So.2d 467, 469 (Fla. Dist. Ct. App. 1971). Other state courts commonly review legislative history in determining legislative purpose. *See, e.g., Nebraska ex rel. Rogers v. Swanson*, 219 N.W.2d 726, 730 (Neb. 1974) (approving trial judge's examination of the legislative floor debate); *Menzies v. Fisher*, 334 A.2d 452, 455 (Conn. 1973) (reviewing transcript of legislative proceedings).

McKesson has submitted records of official actions of legislative and executive departments of Florida, which constitute legislative history of the Revised Florida Products Exemption. This Court, applying Florida law about the judicial notice of official actions of legislative and executive departments, section 90.202(5), Florida Evidence Code, and following the example of other courts, may properly take judicial notice of this legislative history. For example, in *Jacksonville Electric Authority v. Dept. of Revenue*, 486 So.2d 1350, 1354 (Fla. Dist. Ct. App. 1986), the First District reviewed a legislative committee's discussion of a bill, noting the sponsor's explanation of the bill's purpose, and stated that such official actions of legislative departments of the state may be judicially noticed. *See also Brennan v. Udall*, 251 F.Supp. 12, 24 (D.Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir 1967), *cert. denied*, 389 U.S. 975 (1967); *Menzies v. Fisher*, 334 A.2d 452, 455 (Conn. 1973); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2410 (1971); 31 C.J.S. *Evidence* § 43 (1964). A California appellate court, applying an evidence code section that is almost identical to Florida law,[2] approved the trial court's judicial notice of legislative

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[2] Section 452(c) of the California Evidence Code authorizes judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

Section 90.202(5) of the Florida Evidence Code authorizes judicial notice of "[o]fficial actions of the legislative, executive, and judicial

history, including testimony at legislative hearings and correspondence from the legislative analyst and from a state agency directed to the Governor's office recommending action on a particular bill. *Post v. Prati*, 90 Cal.App.3d 626, 634 (Cal.Ct.App. 1979).[3]

Indeed, when courts use legislative history to disclose the general purpose of a statute, judges find legislative history to be, in general, a reliable source. *See* Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv.L.Rev. 370, 379 (1947). When this Court considers McKesson's submission of Florida legislative history, the Court will find the history, in this case, particularly reliable. First, the Florida legislative history focuses primarily on the statements of the sponsors of the legislation, both in the House and in the Senate. When reviewing legislative history, courts emphasize the statements of sponsors. *See, e.g., Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); *Gartner v. Soloner*, 384 F.2d 348, 353 (3rd Cir. 1967). Second, as the legislative history reveals, the sponsors clearly articulate, rather than merely intimate, the purpose of the legislation. Third, the legislators do not advance any competing purposes that might obfuscate the legislative intent. Rather, the legislature's expressed intention to preserve a discriminatory, protectionist preference for Florida commerce constitutes a consistent, dominant theme in deliberations within both legislative and executive departments.

CONCLUSION

Since the United States Supreme Court's decisions require this Court to determine the Florida legislature's purpose in enacting the

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departments of the United States and of any state, territory, or jurisdiction of the United States."

The Sponsors' Note following section 90.202 refers several times to the California Evidence Code for comparison

3 Among the legislative history McKesson submits for judicial notice are reports from a legislative analyst and correspondence from the Secretary of a state agency directed to the Governor's office recommending action on the Revised Florida Products Exemption.

Florida statutes in order to resolve McKesson's challenge under the Commerce Clause, and since Florida law, in any event, permits the taking of judicial notice of the legislative history, this Court should grant McKesson's request that the Court take judicial notice of the Florida legislative history for the Florida statutes. This Court will find the Florida legislative history an invaluable guide in determining the Florida legislature's purpose in enacting the statutes.

Dated: October 16, 1986.

/s/ James M. Ervin, Jr.
Martha W.Barnett
James M. Ervin, Jr.
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Tallahassee, FL 32302
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and

David G. Robertson
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(Certificate of service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

PLAINTIFF MCKESSON CORPORATION'S RESPONSE
TO "DEFENDANT'S FIRST REQUEST FOR ADMISSIONS"

Pursuant to Florida Rule of Civil Procedure 1.370, plaintiff McKesson Corporation ("McKesson") hereby responds to "Defendants' First Request For Admissions" as follows:

FIRST GENERAL OBJECTION

McKesson objects to each of the individual Requests to the extent each may seek information subject to the attorney-client privilege, the work-product doctrine, or both.

SECOND GENERAL OBJECTION

McKesson objects that defendants' purported definition of the term "you" to include McKesson's "employees and authorized agents" makes the individual Requests ambiguous, overly broad, and unduly burdensome.

RESPONSE

REQUEST FOR ADMISSION NO. 1:

That during 1981 you distributed and sold 24,031.94 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 2:

That during 1982 you distributed and sold 6,956.52 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence for the period July 1, 1985, to the present.

REQUEST FOR ADMISSION NO. 3:

That during 1981 you distributed and sold 705 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under sections 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 4:

That during 1982 you distributed and sold 321.45 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 5:

That during the refund period the taxes for which you seek a refund were included in the sales prices charged by you for wines and liquors sold by you to licensed retail vendors, in addition to all other taxes, costs, and overhead expenses incurred by you with regard to the sale of those products, and in addition to the profit included by you in the sales price of those products.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

McKesson objects that the phrases "included in the sales prices" and "included by you in the sales price" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 6:

For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period the taxes for which

you seek a refund were included in the sales prices charged for each such unit of product and were included in such prices in addition to all other taxes, costs, overhead expenses incurred by you with respect to the sale of such units of product, and in addition to the profit included by you in the sales prices for such units of product.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

McKesson objects that the phrases "included in the sales prices" and "included by you in the sales price" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 7:

For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period, the taxes for which you seek a refund became part of the debt due from the retail vendors to you and, upon delivery of the products, were collectible as any other debt due to you.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

McKesson objects that the phrases "became part of the debt due" and "were collectible as any other debt due" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 7(a):

That you have been fully paid for all units of wine and liquor products which you distributed to your customers during the refund period to and including September 6, 1986.

RESPONSE TO REQUEST NO. 7(a):

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies the Request.

REQUEST FOR ADMISSION NO. 8:

During the refund period, you were not licensed as a manufacturer of alcoholic beverages in Florida or elsewhere and did not operate as such.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

McKesson contends that it is entitled to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.), as a distributor of alcoholic beverages. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 9:

During the refund period if a manufacturer's product in which you dealt as a distributor was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985), such exemption was available for your benefit equally as compared with other distributors who dealt in the same product.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which did not deal in exempt products during the refund period, admits that, if a manufacturer's product was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985 Supp.), such exemption was equally available for all distributors that dealt in the same product.

REQUEST FOR ADMISSION NO. 10:

During the refund period, if a manufacturer's product in which you dealt as a distributor was not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985), all distributors dealing in such product paid the full excise tax imposed.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which did not deal in exempt products during the refund period, admits that all distributors that did deal in products that were not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985), had an obligation to pay the full excise tax imposed.

REQUEST FOR ADMISSION NO. 11:

During the refund period, you paid beverage excise taxes on wines and liquors in which you dealt, which products were not exempt or partially exempt from the tax, without protesting to Defendants or the State of Florida the payment of the tax, without voicing question to Defendants or to the State regarding constitutionality of the provisions

of § 564.06 and § 565.12, *Fla. Stat.* (1985), and without advising Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which paid beverage excise taxes on wines and liquors in which it dealt during the refund period, which products were not exempt or partially exempt from the tax, denies that it did not protest payment of the tax to Defendants or the State, denies that it did not voice question to Defendants or the State regarding the constitutionality of the provisions of §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), and denies that it did not advise Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

REQUEST FOR ADMISSION NO. 12:

During the refund period, you were aware that the beverage excise taxes paid on wines and liquors which were not exempt or partially exempt from the tax would be appropriated and expended for governmental operations and programs.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which is not aware of how the beverage excise taxes which it paid may have been spent, admits that taxes are normally appropriated and expended for governmental operations and purposes.

REQUEST FOR ADMISSION NO. 13:

The taxes paid during the refund period until June 30, 1986 have been appropriated and expended for governmental operations and programs.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which is not aware of how the beverage excise taxes which it paid may have been spent, admits that taxes are normally appropriated and expended for governmental operations and purposes.

REQUEST FOR ADMISSION NO. 14:

That during the refund period you were approached by Jacquin-Florida Distilling Co. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Jacquin-Florida Distilling Co. approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 15:

That you declined the offer referred to in paragraph 14.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

In view of McKesson's response to Request No. 14, Request No. 15 does not apply.

REQUEST FOR ADMISSION NO. 16:

That during the refund period you were approached by Lafayette Vineyards & Winery, Ltd. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Lafayette Vinyards & Winery, Ltd., approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 17:

That you declined the offer referred to in paragraph 16.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

In view of its response to Request No. 16, Request No. 17 does not apply.

REQUEST FOR ADMISSION NO. 18:

That during the refund period you were approached by Todhunter International, Inc. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Todhunter International, Inc., approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 19:

That you declined the offer referred to in paragraph 18.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

In view of its response to Request No. 18, Request No. 19 does not apply.

REQUEST FOR ADMISSION NO. 20:

That prior to January, 1985, you voluntarily withdrew from the distribution of products which qualified for the exemptions provided in §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.).

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.*

(1985 Supp.) for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 21:

That you were offered by Todhunter International, Inc., Jacquin-Florida Distilling Co., or Lafayette Vineyards & Winery. Ltd., or all of them, the opportunity to distribute their products which qualified for exemption or partial exemption from the beverage excise tax under §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.).

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 22:

That you declined the offer or offers referred to in paragraph 21.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is

neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

Dated: October 28, 1986.

Martha W. Barnett
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and

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S RESPONSE TO "DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS"

Pursuant to Florida Rule of Civil Procedure 1.350, McKesson Corporation ("McKesson") hereby responds to "Defendants' First Request for Production of Documents" as follows:

FIRST GENERAL OBJECTION

McKesson objects to each of the individual Requests to the extent each may seek information subject to the attorney-client privilege, the work-product doctrine, or both.

SECOND GENERAL OBJECTION

McKesson objects to producing documents at Room 210, Montgomery Building, Kroger Executive Center, Apalachee Parkway, Tallahassee, Florida, as unduly burdensome.

PRODUCTION OF DOCUMENTS

Subject to an agreement of counsel regarding the time, place, manner, and scope of the production, McKesson will produce documents as follows:

REQUEST NO. 1:

All documents identified in response to Defendant's First Interrogatories.

RESPONSE TO REQUEST NO. 1:

McKesson objects that the Request's general reference to "Defendants' First Interrogatories to Plaintiff," which, in turn, generally refers to "Defendants' First Request for Admissions," makes the Request vague, ambiguous, overly broad, and unduly burdensome.

Subject to its general and specific objections, McKesson will produce those documents specifically identified in "Plaintiff McKesson Corp.'s Response to 'Defendants' First Interrogatories to

REQUEST NO. 2:

All memoranda, reports, written recommendations, and written directions to or by the person or persons responsible for pricing decisions with regard to wine and liquor sold by you during the time period January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984, which documents address the pricing of such wine and liquor sold by you during those time periods.

RESPONSE TO REQUEST NO. 2:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid pursuant to §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request seeks information that is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 3:

All documents which constitute, reflect, or refer to pricing calculations or work sheets with respect to wine and liquors sold by you for the periods of January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984.

RESPONSE TO REQUEST NO. 3:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid pursuant to §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 4:

All sales invoices for wine and liquor sold by you during the months of May - August, 1977 and during the months of July - October, 1983.

RESPONSE TO REQUEST NO. 4:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985), for the time period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 5:

All memoranda and other documents in your possession, other than those prepared in anticipation of this litigation, which discuss or refer to the constitutionality or unconstitutionality or the legality or illegality of the excise tax imposed on wine and liquor by §§ 564.06 and 565.12, *Fla. Stat.*, and the exemption provided by those statutes to

wine and liquor products produced from Florida-grown products and bottled in Florida.

RESPONSE TO REQUEST NO. 5:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson has no such documents.

REQUEST NO. 6:

The minutes of all meetings of your board of directors from January 1, 1977 to date.

RESPONSE TO REQUEST NO. 6:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 7:

All reports to stockholders from January 1, 1977 to date.

RESPONSE TO REQUEST NO. 7:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 8:

All records pertaining to stockholders' meetings held since January 1, 1977.

RESPONSE TO REQUEST NO. 8:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 9:

All notices of protest delivered to Defendants or to the State of Florida by you on your behalf regarding payment of beverage excise taxes from January 1, 1980 to date.

RESPONSE TO REQUEST NO. 9:

McKesson objects that the Request is overly broad.

Subject to its general and specific objections, McKesson will produce any such documents that relate to the refund period.

REQUEST NO. 10:

All written communication from and after January 1, 1980 between you and Todhunter International, Inc.; Jacquin-Florida Distilling Company or Lafayette Vineyards & Winery, Ltd; or all of them; regarding your distribution or possible distribution of their wines and liquors.

RESPONSE TO REQUEST NO. 10:

McKesson objects that the Request is overly broad.

Subject to its general and specific objections, McKesson will produce any such documents.

Dated: October 28, 1986

Martha W. Barnett
James M. Ervin, Jr.
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, FL 32302
(904) 224-7000

and

David G. Robertson
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, CA 94104-2105
(415) 434-7000

VERIFICATION

I, JAMES J. GILLEN, declare as follows:

I am Vice-President, Accounting and Controls, of McKesson Wine and Spirits Company, a division of McKesson Corporation ("McKesson"). I am authorized to make this verification on McKesson's behalf.

I have read "Plaintiff McKesson Corporation's Response to 'Defendant's First Interrogatories to Plaintiff'" and am informed and believe that McKesson's answers therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October __, 1986, at San Francisco, California.

JAMES J. GILLEN

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANT'S MOTION TO STRIKE PORTIONS
OF AFFIDAVITS OF HAROLD P. OLMO AND ANNE E. PECK

Plaintiff McKesson Corporation having served upon Defendant Division of Alcoholic Beverages and Tobacco, et al. (Defendant) Affidavits of Harold P. Olmo and Anne E. Peck in support of Plaintiff McKesson Corporation's motion for partial summary judgment and for a preliminary injunction pursuant to Rule 1.510 and Rule 1.610, Fla. R. Civ. P., Defendant, by and through the undersigned attorneys, hereby moves this Honorable Court to strike certain portions of said motions herein enumerated, pursuant to Rule 1.510(e), Fla. R. Civ. P.

AFFIDAVIT OF HAROLD P. OLMO

1. Defendant moves to strike all but the first two sentences of paragraph five (5) of the Affidavit of Harold P. Olmo, or in the alternative, any reference to consumer preference and competitive advantage contained within said paragraph.

2. Rule 1.510(e), Fla. R. Civ. P., requires affidavits to "show affirmatively that the affiant is competent to testify to the matters stated herein."

3. The affidavit of Olmo fails to comply with that rule as concerns the above-referenced statement. Said statement is not shown to have been made by an affiant competent to testify to the matters stated therein and should be stricken for its failure in this respect. *C.f., Prohaska v. Bison Co.*, 365 So.2d 794 (Fla. 1st DCA 1978);

Consolidated Mutual Insurance Co. v. Hampton Shops, Inc., 332 So.2d 101, 102-03 (Fla. 3rd DCA 1976).

4. Affiant Olmo's putative [sic] area of expertise would appear to be viticulture and/or horticulture. The affiant recites that the affiant's "principle field of interest has been the study and improvement of grape varieties. . . ."

5. The affidavit of Olmo does not affirmatively show, as is required by rule, affiant to possess sufficient training, competency, experience, or knowledge, so as to qualify said affiant to offer an opinion with regard to the subject of consumer preferences or consumer demand.

6. The affidavit of Olmo does not affirmatively show, as is required by rule, affiant to possess sufficient training, competency, experience, or knowledge, so as to qualify said affiant to offer an opinion with regard to the subject of a product's competitive advantage or lack thereof.

7. The affidavit of Olmo, in particular the passage referenced above, does not set forth facts as would be admissible in evidence as is required by rule. Affiant's testimony and the contentions therein contained are inadmissible insofar as they have absolutely no factual underpining [sic] and supporting particulars for the assertions therein made. *Samuel v. Magnum Realty Corp.*, 431 So.2d 241 (Fla. 1st DCA 1983).

8. The testimony from the affidavit of Olmo, and the contentions therein contained, are inadmissible as evidence, since as there is no allegation that the factual basis supporting such contentions--if any such support may exist--comprise facts or data of the type reasonably or customarily relied upon by experts in the subject matter. An expert's opinion may not be speculative and must be based upon reliable scientific principles. If it is not, it is inadmissible. *See Delap v. State*, 440 So.2d 1242 (Fla. 1983). An expert's opinion is

inadmissible when based upon insufficient data. *Huskey Industries, Inc. v. Black*, 434 So.2d 988, 992-93 (Fla. 4th DCA 1983).

AFFIDAVIT OF ANNE E. PECK

9. Similar reasoning leads to the conclusion that significant portions of the affidavit of Anne E. Peck should be stricken as not in compliance with Rule 1.510, Fla. R. Civ. P.

10. Peck's affidavit, particularly the paragraphs numbered three (3) through six (6), fail to allege that the facts therein are of the type reasonably relied upon by experts in the subject matter. Furthermore, said paragraphs contain numerous references to nebulous concepts typified by phraseology such as "commercially significant amounts," a "few states," and "major producers." Said paragraphs should therefore be stricken under authority of the rule and case law cited above.

11. Peck's affidavit in paragraph number seven (7) is inadmissible because of a failure to allege that the facts underpinning the opinion expressed therein are of the type customarily relied upon by experts in the subject matter--if any such facts exist. The contentions within said paragraph apparently rely upon the prior assertion, also without expressed factual foundation, that a manufacturer *could* use various products in the manufacture of alcoholic beverages to reach the conclusion that producers of various raw materials compete in the sale of such materials. No particular factual underpinning for such opinion is stated by the affiant. Again with regard to paragraph seven (7), the affidavit fails to affirmatively show that affiant is competent to testify regarding the choice of raw materials made by a manufacturer and the particulars that any one manufacturer or group thereof may consider when making any such choice. The bald assertion that such a choice depends on price and demand *only* is pointed to as an indication of the danger inherent in relying on such conclusory testimony. For these reasons, the paragraph should be stricken under authority of Rule

1.510, Fla. R. Civ. P., *Samuels v. Magnum Realty Corp., supra*, and *Huskey Industries, Inc. v. Black, supra.*

12. Similarly, paragraphs eight (8) through eleven (11) of Peck's affidavit fail to allege a basis in fact customarily relied on by experts in the field, insofar as they have any basis in fact whatsoever. Rather they are conclusory allegations going to Plaintiff's ultimate issue without providing any useful information. Again, no particular factual underpinning is suggested for the broad assertions of opinion made by the affiant. Moreover, the affidavit fails to affirmatively show that the affiant is competent to testify regarding whether producers would "necessarily suffer an economic discrimination," or to any "dramatic effects" produced by alcoholic beverages taxes.

13. Paragraph twelve (12) and thirteen (13) do not set forth such facts as would be admissible in evidence. Affiant's testimony is couched in such generalities such as: "the majority of these foreign countries". . . "have policies that favor their domestic producers". . . "many manufacturers in these countries."--Again, conclusions are reached by affiant without factual support, let alone such facts as are customarily relied upon by experts in the field. For example, affiant claims in essence that any differential in Florida taxes "will affect these countries' ability to export their products to the United State." This statement represents surmise, is conclusory and lacks factual predicate, as does the entirety of said paragraphs. The affidavit fails to affirmatively show affiant to be competent to testify as to the effect Florida's scheme of taxation may have on interstate and international commerce or the export of products to the United States. For these reasons, paragraphs twelve (12) and thirteen (13) should be stricken under the authority of the above cited rule and case law.

WHEREFORE, Defendant moves this Honorable Court to strike the above referenced portions of the affidavits of Olmo and Peck filed in support of Plaintiff's Motions for Partial Summary Judgment and for a Preliminary Injunction.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904-487-2142

COUNSEL FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 0191049

(Caption omitted in printing)

DEFENDANTS' MOTION TO DISMISS

Defendants hereby move to dismiss the Complaint and state:

1. McKesson Corporation (hereinafter "McKesson") fails to allege any facts which state a cause of action with respect to the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985). McKesson alleges only that it is a distributor of domestic and imported alcoholic beverages (Complaint, paragraph 1.) McKesson does not allege that it distributes any alcoholic beverage which has been or would be disqualified from receiving the exemptions provided under ss. 564.06(2)-(4), 565.12(1)(b), (2)(b), *Fla. Stat.* (1985) by reason of the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985).

Further, by reason of such failure, McKesson lacks standing to challenge the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat*, 1985., since McKesson has not shown that its rights or duties are affected by those subsections. *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311, 317 (Fla. 1984), *app. dis.*, _____U.S. _____, 106 S.Ct. 213, _____ L.Ed.2d _____ (1985); *Voce v. State*, 457 So.2d 541 (Fla. 4th DCA 1984).

McKesson has incorporated paragraph 12 of its Complaint, which paragraph challenges the provisions §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985), into each count of the Complaint.

WHEREFORE, Defendants move to dismiss or to strike paragraph 12 of the Complaint, Count IV, Count VII and to dismiss each remaining count of the Complaint insofar as such count purports to be predicated upon a challenge to §§564.06(a), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985).

2. The Complaint fails to state a cause of action predicated upon the product exemption provisions of §§564.06(2) - (4), 565.12(1)(b), (2)(b), *Fla. Stat.* (1985). It is not alleged, nor are proofs offered by Plaintiff; that sugar cane, citrus, or the grape species enumerated in §564.06(2)-(4), *Fla. Stat.* (1985), are exclusively indigenous to Florida. Indeed, the proof is exactly to the contrary.

It is clearly premissible [sic] for State of Florida to enact laws which have the purpose and effect of promoting the recognition and use of products which Florida produces in the manufacture of alcoholic beverages. *E.G., Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049, 3056 (1984); *Parker v. Brown*, 317 U.S. 341 (1943). The only limitation upon that power of tax classification is that the statutes not discriminate against interstate commerce in promoting that end.

Plaintiff does not allege, nor does it offer proofs, that the agricultural products selected for tax encouragement are grown only in Florida, nor that they are capable of growth only in Florida. Allegations that the products selected for tax encouragement are grown in Florida but are also grown, or capable of growth, in other states and nations do not state a cause of action for unlawful discrimination under the Equal Protection Clause, The Commerce Clause or the Import/Export Clause.

Encouraging the use of such products in the manufacturing of alcoholic beverages certainly has an incidental effect upon interstate commerce. But equally so does the forced stabilization of product prices, which has been upheld agianst [sic] such attacks. *Parker v. Brown, supra.* Such encouragement has no more effect on interstate commerce than does the use of state revenues to promote citrus, or

sugarcane, or the grape species in question. Such actions are commonplace and certainly not violative of the Commerce Clause, The Equal Protection Clause or the Import/Export Clause.

The statutes clearly do not rise to the level of prohibited regulation of interstate or foreign commerce. If such a proposition were accepted, it would mean that, for instance, Florida would be prohibited from granting favorable tax treatment to lands in Florida devoted primarily to agricultural use, because such tax encouragement would grant some indirect "commercial advantage" to corn, or wheat, or citrus produced in Florida. Indeed, under such an analysis, the provisions of ss. 564.06(2)-(4), 565.12(1)(b), (2)(b), *Fla. Stat.*, are much more clearly permissible than the provisions of §193.461, *Fla. Stat.*, since the former offer favorable tax treatment to beverages made from products which are widely grown and produced outside of Florida.

WHEREFORE, Defendants move to dismiss the Complaint for failure to state a cause of action.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904/487-2142

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR #. 0191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST TO TAKE JUDICIAL NOTICE

Defendants request the Court to take judicial notice of the following facts, pursuant to s. 90.202(11)(12), Fla. Stat. (1985):

1. That sugarcane is produced in the following States and Nations:

> Angola, Cameroon, Chad, Congo, Egypt, Ethopia [sic], Gabun, Ghana, Guin Republic, Ivory Coast, Kenya, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Nigeria, Reunion, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Upper Volta, Zambia, Zaire, Aimbabwe, Hawaii, Barbados, Belize, Costa Rica, Cuba, Dominican Republic, El Salvador, Puerto Rico, Guadeloupe, Haiti, Honduras, Jamaica, Martinique, Mexico, St. Kitts, Nicaragua, Panama, Trinidad/Tobago, Argentina, Bolivia, Brazil, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela, Bangladesh, Burma, China, India, Indonesia, Iran, Iraq, Japan, Malaysia, Nepal, Pakistan, Phillippines [sic], Sri Lanka, Taiwan, Thailand, Vietnam, Australia, Fiji, Papua/New Guinea.

2. That citrus is produced in California, Texas, Florida, Louisiana, and Arizona and in Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt.

In support of this request, Defendants submit true copies of the Affidavits of Fred Davies and Joseph R. Orsenigo filed in *Tampa Crown Distributors, Inc. Florida Beverage Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, Case No. 86-773 (Fla. 2nd Jud. Cir.).

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
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(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR No. 191049

(Caption omitted in printing)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

Defendants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller submit this Memorandum in Opposition to Plaintiff's request that the Court take judicial notice of the matters contained in Plaintiff's appendix to its Motion.

Federal decisional law does not require this Court to take judicial notice of the matters plaintiff proposes. Legislative intent was not held to be determinative of constitutionality in the cases cited by Plaintiff. Neither does the appendix contain or memorialize offical [sic] actions of the legislative or executive departments of this state, matters judicially noticeable under §90.202(5), Fla. Stat. Rather, the appendix contains the impressions of individuals both before and after the fact. Moreover, no statutory ambiguity has arisen, which ambiguity is the sine qua non for resort to extrinsic aids to determine legislative intent.

I. ANALYSIS OF CHALLENGES TO THE CONSTITUTIONALITY OF STATUTES UNDFR THE COMMERCE CLAUSE REQUIRES THIS COURT TO EXAMINE ONLY THE STATUTORY LANGUAGE AND ITS PRACTICAL EFFECT.

The clearest expression of legislative intent, or purpose, is found in the words chosen by the legislature to be enacted into law. *E.g., St.*

Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). It is submitted that for Commerce Clause analysis, legislative intent and legislative purpose are synonymous. Plaintiff argues as much in its Memorandum in Support of its Motions for Partial Summary Judgment and for a Preliminary Injunction at page nine, footnote one. This being the case, the above-stated rule that lack of ambiguity precludes resort to extrinsic aids is equally applicable to Florida courts examining Florida statutes for federal Commerce Clause violations.

The federal decisions cited by the Plaintiff do not hold that this Court should judicially notice matters such as are contained in the subject appendix. The case of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), does not stand for the proposition that the United States Supreme Court has mandated this Court, as a matter of federal constitutional law, to judically [sic] notice transcripts of committee hearings and/or the memoranda of members of the executive branch written after the bill has passed both houses. In fact, the *City of Philadelphia* court held the "dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. *Id.* at 627.

Neither do the other cases cited by Plaintiff mandate any such action. For example, the court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), rests its decision on the practical effect and actual burden imposed by the statute there in question. The mere fact that certain items of legislative history supportive of the court's conclusion are referenced in it's opinion is not suprising [sic]. Nor is it supportive of the broad mandate Plaintiff would seek to have it impose. Similarly, in *Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263 (1984), the court references certain indicia of intent. Nevertheless, the court rested its decision upon statute's discriminatory effect. The mere recitation of legislative history cannot be said to mandate resort to extrinsic aids where a statute speaks plainly on its face. *See also Best of Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). ("In each case it is

our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.")

It is submitted that the cases of *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), and *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), are inapplicable to a case involving federal commerce clause analysis. *Arlington Heights* involved a case of racial discrimination with the stated constitutional question being whether an invidious discriminatory purpose is *a* motivating factor, while *National Railroad* involves a federal court's construction of a federal statute to determine whether it conferred a private right to bring an action in court.

Thus, the federal courts have not mandated that this Court judicially notice the matters contained within the appendix to Plaintiff's Motion. Rather, insofar as legislative intent or purpose is relevant, first resort should be had to the language of the statute. If this language is found to be clear in relation to the facts submitted, which is the case here, the inquiry into intent should find an end with such language.

II. THIS COURT SHOULD NOT JUDICIALLY NOTICE THE DOCUMENTS OFFERED IN PLAINTIFF'S APPENDIX TO ITS MOTION.

It would be helpful before proceeding further to distinguish between the different types of exhibits being offered for judicial notice. They fall into four general categories: (1) transcripts of committee hearings; (2) transcripts of floor debates; (3) a memo entitled "Legislation Analysis", dated June 18, 1985; and (4) a memo on the letterhead of the Department of Business Regulation, dated June 5, 1985.

As so catagorized [sic], these materials present at least two broad questions, the answers to which, preclude this Court from taking

judicial notice. The first issue is whether the plain meaning rule precludes resort to extrinsic aids in determining legislative intent. This broad issue subsumes at least one other question: Are the particular documents advanced relevant to a determination of legislative intent? The second issue presented is whether the materials qualify as "official actions" as that term is used in §90.202(5), Fla. Stat.

1. The statute being free from ambiguity given the acts submitted, the plain meaning rule precludes resort to extrinsic aids to determine legislative intent.

A cardinal rule of interpretation is that "courts will look to legislative history only to resolve ambiguity in a statute." *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879, 882 (Fla. 1983). *See City of Tampa v. Thatcher Glass Corporation*, 445 So.2d 578,579 (Fla. 1984); *Roush v. State*, 413 So.2d 15, 19 (Fla. 1982); *Carson v. Miller*, 370 So.2d 10, 11 (Fla. 1979); *Heredia v. Allstate Insurance Company*, 358 So.2d 1353, 1355 (Fla. 1978); *S.R.G. Corp. v. Department of Revenue*, 365 So.2d 687, 689 (Fla. 1978). Thus, intent is determined in the first instance by the plain meaning of the statute. *St. Petersburg Bank & Trust Company v. Hamm*, 414 So.2d 1071, 1073 (Fla. 1982). Plaintiff does not suggest that any such ambiguity exists. Rather, Plaintiff argues that even absent ambiguity, this Court must delve into the legislative history to somehow ascertain the legislature's "true purposes". However, resort to extrinsic aids is not mandatory and in this case not helpful, given the clearly expressed language found in the subject statutes. Therefore, in keeping with the plain meaning rule, insofar as legislative intent is relevant to this Court's decision, the statute speaks for itself.

The cases cited by Plaintiff are consistent with the plain meaning rule. In *Florida v. Webb*, 398 So.2d 820 (Fla. 1918), the court was resolving confusion as to the applicability of a probable cause requirement in Florida's stop and frisk law. The court's discussion of legislative intent centered on review of the bill title as an aid to

construction and its reference to "the history of its enactment" was no more than a tracing of the journals or the prior enactments in the area. The court in *E.M. Watkins & Company v. Board of Regents*, 414 So.2d 583 (Fla. Dist. Ct. App. 1982), considered varied interpretations of an agency's rule which the agency admitted was inartfully drawn. The contractor interpreted the rule in such a way as to nullify the statute upon which the rule was based, as shown by certain items of legislative history. Similarly, in *Speights v. Florida*, 414 So.2d 574, 576 (Fla. DCA 1982), the court therein stated, "[t]here is an apparent conflict between the two statutes. Application of the rules of statutory construction is necessary to ferret out the answer." Therefore, given the lack of ambiguity in the statutes presently under consideration, the general rule in Florida against resort to extrinsic aids in such situations is fully applicable to the present case.

Even should Plaintiff overcome this general rule, however, the specific materials advanced for judicial notice are not relevant to the present issues of consideration. First, and most obviously, the materials found in what has been categorized above as numbers (3) and (4) are irrelevant to any determination of legislative intent. Despite Plaintiff's characterization on page six, of its Memorandum in Support of its Request, the particular "Legislation Analysis" (number 3) does not appear to have originated within the legislative branch, but rather within the executive branch. It notes "the policy of this administration. . . ." It notes recommended action for the Governor. Importantly, it is dated after passage of the bill by both houses of the legislature. Inasmuch as it is a postenactment statement it is irrelevant to any issue before this Court with regard to legislative purpose or intent. *E.G., Security Feed & Seed Company v. Lee*, 189 So. 869 (Fla. 1939).

Similarly, the document categorized above as number (4), indicating correspondence between members of the executive branch and dated after passage of the bill is irrelevant to any determination of legislative intent. The rule in Florida, which is in accord with the rule

applied in the federal courts, accords the postenactment statements, even of legislators themselves, little or no weight at all. *Compare, Security Feed & Seed Company, supra, with, e.g. Petry v. Block*, 697 F.2d 1169 (D.C. Cir. 1983). The correspondence contained in the Plaintiff's appendix is entitled to no probative weight at all and is in no way useful as an extrinsic aid to determining the legislature's intent.

At the outset of the discussion of the various transcriptions included within the above categories (1) and (2), it must be submitted that the comments of individual legislators are not necessarily indicative of the legislative intent as a whole upon passage of the statutes under attack. The "intent" expressed during a debate may not be the intent at all at another point in time.

> [I]t is impossible to determine with certainity [sic] what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof.

United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318 (1897).

2. The material submitted do not qualify as "official actions" as that term is used in the evidence code.

Section 90.202, Fla. Stat., addresses matters which may be judicially noticed, subsection (5) thereof providing in relevant part for the "official actions of the legislative, executive, and judicial departments of . . . any state. . . ." Plaintiff proposes too broad a reading of "offical [sic] actions." *See Amos v. Moseley*, 77 So. 791 (Fla. 1940) (executive orders signed by the Governor and attested to by the Secretary of State). Plaintiff's reliance of *Jacksonville Electric Authority v. Department of Revenue*, 486 so.2d 1350 I (Fla. DCA 1986), is misplaced. That case involved construction of a statute which was concededly vague and ambigious [sic], calling for the use

of extrinsic aids to determine legislative intent. Such is not the case here. Moreover, the court in that case required public records and reports--such as the tapes to which it referred--to be authenticated, thereby precluding judicial notice of same, while recognizing that the official actions to which it previously referred--the journals--may be judically [sic] noticed. Thus, Florida decisional support the Plaintiff's proposition that the materials which are contained in its Appendix are "official acts" which may be judicially noticed.

CONCLUSION

For the above stated reasons it is respectfully submitted that this Court should not judicially notice the documents contained in Plaintiff's Appendix to its Motion, that such is unnecessary given the clear language of the statute and that such action is contrary to the Florida Rules of Evidence.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904-487-2142
COUNSEL FOR DEFENDANTS

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997

(Caption omitted in printing)

DEPOSITION OF STAN F. STARZYK

219 Northwest 12th Avenue
Miami, Florida
Thursday, November 6, 1986
12:10 p.m.

Reported by MARY MEYER, Court Reporter and Notary Public for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

APPEARANCES:

MORRISON & FOERSTER, P.A.,
BY: DAVID ROBERTSON, ESQ.,
California Center, 345 California Street,
San Francisco, California 94101-2105
On behalf of the Plaintiff.

STATE OF FLORIDA,
Department of Legal Affairs,
BY: DANIEL C. BROWN,
Assistant Attorney General,
The Capitol,
Tallahassee, Florida 32301
On behalf of the Defendants.

CULPEPPER, PELHAM,
TURNER & MANHEIMER, P.A.,
BY: M. STEPHEN TURNER, ESQ.,
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On behalf of the Defendant/Intervenors.

ALSO PRESENT:
STEEL, HECTOR & DAVIS, P.A.,
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On behalf of Brown-Forman
d/b/a California Cooler.

* * * * * * * *

(p.53)
Clearwater – it goes north. It stops somewhere short of the Panhandle. The Panhandle is another distribution area and then Orlando/Jacksonville is the fourth designated area.

[By Mr. Brown:]
Q. Who distributes in that area, Orlando/Jacksonville, for your company?

A. We are not – that is distributed out of Jacksonville? We do not have a house in Jacksonville, a distribution center in Jacksonville.

Q. How do you physically distribute out of Jacksonville now?

A. We don't.

Q. Okay. So you just don't service Orlando or Jacksonville?

A. We do not.

Q. Mr. Starzyk, can I ask you to look again at Mr. Collins' affidavit, specifically paragraph nine that says that, "Since 1985 when sections 564.06 and 565.12 Florida Statues –

MR. TURNER: 1985:

BY MR. BROWN:
Q. "1985 became effective, McKesson has suffered a significant loss in sales of its products as a result of the competition with other distributors' products that have received the tax exceptions and preferences."

(p.54)
Would you please tell me what magnitude in dollars that significant loss is?

A. I could say it could range into the millions of gross dollars.

Q. It could or it does?

A. I would say it does.

Q. Do you have records that show a loss as a result of competition with the exempt products?

A. I looked over the areas of the decline of some competitive brands that directly relate to those Florida produced products, and it's significant, and I also know what pricing of the Florida produced products versus the pricing of some of the products that I sell is.

You know, it's a vast difference because of pricing, and those commodity-type products, it's very price sensitive. And if you are competitively priced, you sell the products; and if you are not competitively priced, those brands suffer. They don't sell.

Q. Which brands are you referring to specifically?

A. I;m talking in general of vodka and gins. I'm talking about Bacardi Rum, Castillo Rum and really for a matter of fact all – so many distilled products that compete against the products that are produced from (p.55) citrus or cane.

Q. So, are you saying that the loss referred to in that paragraph, whatever the amount may be, is a result of competition between products you distribute such as in the vodka, gin and rum area?

A. And wine and coolers.

Q. And the competition between those products and vodka and gin made from sugar cane –

MR. ROBERTSON: I think you are misstating the testimony. He said in their competition with all the Florida exempt products.

MR. BROWN: I'm just trying to get some more specific idea of this competition that's resulting in your loss.

BY MR. BROWN:

Q. Specifically, what products are you distributing that are in direct competition with other products that are causing the loss?

A. All the products that I sell that are competing with Florida produced products suffer to some degree because of the price differential.

Q. Let's take them one at time (sic).
Okay. You distribute vodka; right?

A. Right.

(p.56)
Q. You distribute vodka made from potatoes?

A. Grain.

Q. Grain.
What brands are those?

A. Volga Vodka, Absolut Vodka, Crystal Palace Vodka, Taaka Vodka.

Q. Okay. Now, what products are those vodkas in competition with that has caused you to lose money? What vodka products? Start there.

MR. ROBERTSON: I think you are misstating his testimony. His testimony is not that vodka competes against vodka. It is that –

MR. BROWN: Let the witness tell me what his testimony is.

MR. ROBERTSON: I don't want you to mislead him in terms of mischaracterizing his testimony.

MR. TURNER: He misstated? He's just asking him a question.

MR. ROBERTSON: If I could state my objection.
His testimony is that spirits compete against spirits and that vodka competes not only against vodka but other spirits.

BY MR. BROWN:

Q. Well, that may be the case but obviously your (p. 57) spirits compete against spirits and so your vodkas complete (sic) against other vodkas; is that right?

A. Sure.

MR. ROBERTSON: As well as other items.

MR. BROWN: We can get to those. Now I'm talking about vodka.

BY MR. BROWN:

Q. The vodka you distribute that you just listed for us that are made out of grain, what other vodkas do they complete (sic) with that are made out of sugar cane or some other product?

A. All the vodkas and all the spirits.

Q. Are there vodkas that are made from sugar cane?

A. Sugar cane or citrus.

Q. Okay. What are those?

A. You want me to specifically name those particular products?

Q. Are the vodkas that are made from citrus or cane in competition with the vodkas made from grain that you distribute?

A. Yes.

Q. Okay. What are those vodkas?

A. What are those vodkas?

Q. Are those vodkas made out of gin or citrus (p.58) that are in competition with the vodkas that you distribute?

MR. TURNER: Cane or citrus.

MR ROBERTSON: In addition to the ones spelled out in the affidavit?

MR. BROWN: Let me try it again.

BY MR. BROWN:

Q. You distribute Volga and Absolut, Taaka and Crystal Palace vodkas; is that correct?

A. Right.

MR. ROBERTSON: I don't believe that Mr. Starzyk meant that to be an all inclusive list.

MR. BROWN: I didn't ask if it was.

BY MR. BROWN:

Q. You do distribute at least those four and it's your testimony that those four vodkas are made from grain?

A. Yes, sir.

Q. It is also your testimony, is it not, that other vodka is made not from grain but from citrus or sugar cane; is that right?

A. There are other vodkas made from citrus and sugar cane, you're right.

Q. And are those other vodkas made from citrus and sugar cane distributed in Florida by someone?

(p.59)

A. They are distributed here by someone.

Q. In Florida?

A. Yes.

Q. So, those other vodkas according to your testimony then are in competition with the vodkas you have listed to me that you distribute?

A. Yes.

Q. What are the names of those vodkas that you are in competition with?

A. There are several private labels, citrus products. One is Saxony, Paradise, Whitehall. Those are some of them.

Q. Are you refreshing your memory at the present moment, sir, by looking at a document?

A. Yes, I did.

Q. What document is that?

MR. ROBERTSON: That's Mr. Collins' affidavit.

BY MR. BROWN:

Q. So, is it your testimony now that your memory is refreshed and that your vodkas also complete (sic) against Five Flags Vodka?

A. Sure.

Q. Now, where are Saxony, Paradise, Whitehall and Five Flags Vodka made?

A. I believe they are all produced in Florida.

(p.60)

Q. Do you know what they are made from?

A. It's my belief they are either made from citrus or cane.

Q. Do you know whether that citrus or cane is made in Florida or whether it's imported from somewhere else?

A. I really don't know. I would assume it's in Florida.

Q. Do you distribute any vodka product that is made from sugar cane?

A. To the best of my knowledge, no.

Q. Are there vodka products besides the ones that are listed in this affidavit available for distribution that are made from sugar cane?

MR. ROBERTSON: Object to the use of the words, "Available for distribution."

MR. BROWN: I'll rephrase it.

BY MR. BROWN:

Q. If you wanted to distribute a cane product, a cane vodka product, and you didn't want to distribute one of those, would there be others on the market that you could distribute?

A. I really don't know.

Q. Do you distribute any product such as gin that's made from sugar cane or citrus?

(p.61)

A. I do not.

Q. Has the company ever done so?

A. To the best of my knowledge, no.

Q. Does (sic) vodka and gin from your experience or your company's experience compete against rum?

A. I believe they do sometimes.

Q. Do vodka and gin products compete against bourbon?

A. I believe they do also.

Q. Do vodka and gin products and rum products compete against rye whiskey?

A. I believe all products compete against each other at sometime or another.

Q. To the extent then that someone sells a bottle of rum, they may be displacing a bottle of bourbon that someone might have bought instead?

A. It's a possibility.

Q. Well, sir, you distribute vodka; right?

A. Uh-huh.

Q. You also distribute bourbon; is that right?

A. Uh-huh.

MR. ROBERTSON: You have to answer audibly.

THE WITNESS: Yes.

BY MR. BROWN:

Q. You also distribute corn based liquor (p.62) products: do you not?

A. Yes.

Q. Barley based liquor products?

A. Yes.

Q. Do you distribute rum?

A. Yes.

Q. So, in a sense you're competing against yourself when you distribute those things; are you not?

A. I compete in the marketplace with several different brands for all the consumers.

Q. You sell a bottle of rum that may displace a bottle of bourbon that you might have sold; isn't that true?

A. It's a possibility.

Q. You said that since the effective date of the product exemptions in 1985, at least Mr. Collins says this in his affidavit, McKesson has suffered a significant loss in sales of its products.

How much of a loss in sales?

MR. ROBERTSON: Objection. The question has been asked and answered.

BY MR. BROWN:

Q. How much of a loss in sales?

MR. ROBERTSON: You have previously given an estimate of millions of dollars in gross sales. (p.63) Can you refine that further at this point?

THE WITNESS: No. I really can't.

BY MR. BROWN:

Q. How do you measure that? How do you know it's a loss?

A. Estimated –

MR. ROBERTSON: Objection, asked and answered.

MR. BROWN: The question has not been asked in the past.

MR. ROBERTSON: It has been asked and answered.the witness testified that he could observe over time the sales of his products against other price competition in the market and see a declining sales for certain products.

MR. BROWN: Are you instructing the witness not to answer the question?

MR. ROBERTSON: No, I'll let him answer it.

MR. BROWN: Could you read the question back, please?

(Thereupon, the above-referred to question was read back by the reporter as above recorded.)

A. Estimated case volumes.

BY MR. BROWN:

Q. I'm sorry?

(p.64)
A. Estimated case volumes versus price for –

Q. You are speaking so low I couldn't hear what you said.

A. I said estimation of sales of different products that I represent that are price competitive.

Q. Have you had a net loss in your sales volume since July 1 of 1985?

MR. ROBERTSON: McKesson overall or in Florida or –

BY MR. BROWN:

Q. McKesson in Florida.

Have you lost net sales volume in Florida since July 1, 1985?

MR. ROBERTSON: Have their net sales declined, is that what you are asking?

MR. BROWN: Let me rephrase the question.

BY MR. BROWN:

Q. In other words, you were selling during the years preceding July 1, 1985.

You know what the sales were in Florida; is that right?

A. Well, let me just break that down a little bit and see if this is the answer that you are looking for.

Last year since September 1, October 1, there have been a decrease of case sales. The net sales in (p.65) dollars may be up, but the case sales are down.

Q. Let me take you back because I want to make sure I understand what you are saying.

You know how many cases of wine and distilled spirits McKesson sold in the fiscal year, let's say, for the 12 month period between July 1, 1984 and July 1, 1985; do you not?

A. Yes, I do.

Q. And you know the total number of cases of wine and distilled spirits that McKesson sold between July 1, 1985 and July 1, 1986; do you not?

A. Yes.

MR. ROBERTSON: In rough numbers?

THE WITNESS: Right.

BY MR. BROWN:

Q. How many cases did you sell between July 1, '84 and July 1, '85?

A. Off the top of my head I can't give you that answer. I can give you some reference. Spirits case sales are down.

Q. So, is it your testimony that you have sold less cases in the period between July 1, 1985 and July 1, 198[illegible]f spirits than you did between '84 and '85?

A. Give that to me one more time so I can get it clear in my head.

(p.66)
Q. Why don't I just draw you a little diagram here and maybe I can make myself a little more clear.

This is a time line. On this end is 7-1-84. In the middle is 7-1-85. On this end is 7-1-86, a two year period; right?

Now, this piece here between 7-1-84 and 7-1-85, comparing that to the piece between 7-1-85 and 7-1-86, did you sell more or less cases of liquor from 7-1-85 to 7-1-86 than you did in this period back here?

A. I'm going to have to refrain because I don't know exactly, because there was one major – one major distinction in that time period. That was the Federal excise tax, because that could really distort the numbers.

Q. I don't care what is distorted, sir.

What I'm asking you is if you know if between 7-1-84 and 7-1-85 you sold the same, less than or more than you sold in the same period a year later.

A. I don't know. I can't tell you.

Q. Do you know whether you sold more wine by the case between 7-1-85 and 7-1-86 than you did between 7-1-84 and 7-1-85?

A. I sold more wine.

Q. By case?

A. Yes, sir.

(p.67)
Q. So, you didn't lose any money from your previous sales experience the year before than in 1985; did you?

MR. ROBERTSON: Well, objection. Your question –

MR. BROWN: I'll rephrase the question.

MR. ROBERTSON: Well all these questions have a fundamental flaw in them.

MR. BROWN: That may be. I'll let you argue that to the judge. I'll ask the question –

MR. ROBERTSON: No, you are creating a question that seems to characterize the testimony, and I want to be sure that we are characterizing it correctly. He has not –

MR. TURNER: Well, he has withdrawn the question, I believe.

MR. BROWN: I withdrew the question.

MR. ROBERTSON: All right.

BY MR. BROWN:

Q. So, you didn't actually experience, at least as far as you know with wine, a concrete drop in – well let me rephrase it.

The actual number of cases sold between '84 and '85, July, if you measure a one year period each side of July 1, 1985, you would have a decrease in the (p.68) number of cases you sold; is that right?

A. I don't know if I understand your question, but let me say this – are you referring now to spirits or wine?

Q. Wine.

A. Okay. Wine, we had an increase. We would have had a substantially greater increase if we did not compete against some Florida produced wines.

Q. Okay. Now, how is it that you know you would have had a substantially greater increase?

A. Because of the price competition.

Q. Well, do you have any records that demonstrate that you would have had a substantial increase?

A. Just general knowledge of the working market.

Price points are an important factor and when your competition, for an example, a wine cooler, can sell a dollar a four pack cheaper,

pack cheaper, that consumer is very price conscious and that severely hampered our sales.

Q. But that's your opinion. You don't have any data to back that up; do you?

MR. ROBERTSON: Well –

MR. BROWN: I'm asking him is it an opinion.

MR. ROBERTSON: Other than the working data of a day-to-day operation?

(p.69)
BY MR. BROWN:

Q. Do you know that you lost sales to your competitors? Have you seen any data that showed you that?

MR. ROBERTSON: He already testified that he has.

MR. TURNER: I haven't heard it yet. I would like to hear it too.

BY MR. BROWN:

Q. If you have seen that data, I would like to know what data it is.

A. Well, let me say this:

You can't – there is no data that I have seen nor read that can quantify what you have lost, but if you have any experience in selling and marketing and you see the significant price disparity, that working knowledge tells you that you are losing substantial sales because of a competitive pricing standpoint.

Q. So, I take it that you didn't go to the Department of Business Regulation or any other central repository of records and find out that while you were losing X number of case sales last year your competitors who are dealing exemption products were gaining the same number of case sales; is that correct?

MR. ROBERTSON: Objection, argumentative.

(p.70)
BY MR. BROWN:

Q. I'm just asking you did you go look at those data.

A. I reviewed data as far as spirit gallonage of Florida produced products for my own personal information.

Q. Where is that data?

A. That data is gallonage reports that are provided by the State of Florida.

Q. Who has possession of that data?

MR. ROBERTSON: The State of Florida for one.

THE WITNESS: The State of Florida.

BY MR. BROWN:

Q. Who has possession of the data that you reviewed?

A. I do.

Q. Where do you have it?

A. I have it in my office.

Q. Here in Miami?

A. Yes. They are Florida wine gallonage reports and spirit gallonage reports.

Q. Sir, over the last five years has there been a trend in the sale of alcoholic beverages in general by your distribution outfit and other distribution outfits in Florida?

(p.71)

MR. ROBERTSON: When you say, "A trend," what type of trend are you talking about; quantity, quality, type of –

BY MR. BROWN:

Q. Have you been selling more liquor each year or less liquor each year since 1980?

A. I would have to review the records. I know for the period of '81 and '82 I believe there was an increase and then '83, '84 and '85 there was a decrease in spirit consumption.

Q. And isn't it true that there was also a decrease in spirit consumption not just for McKesson but for all distributors in Florida?

A. I can't say all distributors in Florida, no, that's not true.

MR. TURNER: You mean collectively overall; do you not?

BY MR. BROWN:

Q. Yes. I mean, if you add yourself in with everybody else that distributes liquor, isn't it is (sic) true there will be a decrease in total volume sales since 1980?

A. There is a total decline in consumption, but I can't say it's a decline in consumption from 1980. It may have been a decline in consumption from 1983 to (p.72) 1985, yes, but I don't know about going back to 1980.

Q. Has there been a decline in consumption overall in the Florida liquor market from 1983 to the present?

MR. ROBERTSON: For distilled spirits?

BY MR. BROWN:

Q. For distilled spirits.

A. For distilled spirits, yes.

Q. Has there been a decline since 1983 overall in in (sic) the Florida market with respect to the demand for wines?

MR. ROBERTSON: We are talking gallonage?

BY MR. BROWN:

Q. Gallonage, not price.

A. Since 1983?

Q. Yes.

A. I don't believe so. I believe there has been an increase.

Q. How about since 1982?

A. I would have to go back and review the records.

Q. Could be though?

A. Possibly.

Q. You would agree then, would you not, that if you have lost gallonage sales for the period July 1, 1984 to July 1, 1985, at least part of that reduction (p.73) in gallonage sales could be due to an overall trend of people to drink less; is that true?

A. Possibly, yes.

Q. Well, given that possibility then, how do you attribute your loss –

A. Price competition.

Q. I haven't finished the question.

How do you attribute your loss totally to the effect of these exceptions?

MR. ROBERTSON: I don't believe that he has ever testified that any decrease in sales can be attributed totally to one factor as opposed to any other factor.

BY MR. BROWN:

Q. Is it McKesson's contention that any effect whereby you have lost gallonage sales since July 1, 1985 is attributable only to the price differential on Florida beverages in those statutes?

MR. ROBERTSON: Objection. You may be asking for a legal conclusion.

BY MR. BROWN:

Q. Is that the position that you take?

MR. ROBERTSON: Could you read back the question?

(p.74)

BY MR. BROWN:

Q. Let me rephrase it for you.

Has anything besides the enactment of sections 564.06 and 565.12 and a tax preference to beverages in those statutes, anything besides that that caused you the loss referred to in paragraph nine of Thomas Collins' affidavit?

MR. ROBERTSON: Well –

THE WITNESS: There are other factors.

MR. ROBERTSON: The question is unintelligent. Paragraph nine refers only to the loss because of those factors. It does not speak to the question of whether there might be other loss because of other factors.

MR. BROWN: I'll rephrase it for you again.

MR. TURNER: He's testified that there are other factors.

MR. BROWN: I didn't hear that because counsel was talking at the same time.

BY MR. BROWN:

Q. Is that what you said?

A. Well, rephrase the question and I'll answer.

Q. Are there other sources that caused loss in volume sales for you besides the enactment of the statute you are challenging here?

(p.75)

A. There could be other factors, yes.

MR. TURNER: Well, let the record reflect that I object to the question because it assumes something I don't believe has been shown.

MR. BROWN: I understand.

(Short Recess.)

BY MR. BROWN:

Q. Mr. Starzyk, before we took a break we were talking about paragraph nine of Mr. Collins' affidavit and I would like to ask you a couple more questions about that if I could.

Would you describe for me the records that would demonstrate the loss as a result of competition that is referred to in that paragraph?

MR. ROBERTSON: Well, when you say, "Records," do you mean McKesson's records?

MR. BROWN: McKesson's records.

MR. ROBERTSON: Obviously, to demonstrate you would need the records and the numbers of all the distributors in there.

BY MR. BROWN:

Q. Whatever records McKesson looked at in support of paragraph nine of this affidavit is what I'm interested in.

A. Well, the records that I looked at are (p.76) depletion reports, but more importantly, as you know, anyone who works in McKesson or is trained in marketing, like I said, you go out before and you can survey the stores and you look at the different pricing and the competitive nature, these are things that you are not going to get a specific case number on, but, you know, there is a significant detriment to –or detriment to sales.

Q. Did you do any kind of formalized survey where you went out and checked prices on certain days and wrote down –

A. I have pricing – I have pricing reports, yes.

Q. Well, would you tell me what the pricing reports are?

A. We do a lot of marketing and surveys. We are out there. Our people are out there weekly, and we do different pricing reports of competitive brands, competitive lines, and we are very much aware of different prices.

Q. When you do those reports, do you maintain them or are they just something you throw away when you are done with them?

A. Some of them may be maintained, some of them might be disregarded.

Q. Did you look at those records?

(p.77)

MR. ROBERTSON: You mean discarded?

THE WITNESS: Discarded.

BY MR. BROWN:

Q. Did you look at those reports or did Mr. Collins look at those reports in arriving at the statement contained in paragraph nine of his affidavit?

MR. ROBERTSON: Well, do you mean did he look –

MR. BROWN: As part of the basis for what you are saying.

MR. ROBERTSON: Well, obviously, if he looked at the reports at any point, historically, they are part of his knowledge that would go to making the affidavit.

Are you asking whether he specifically looked at them at the time of the drafting of the affidavit?

MR. BROWN: Yes.

BY MR. BROWN:

Q. Did he specifically look at those reports?

A. I think general information that I have gained through surveying the marketplace and looking at those reports were, you know, in the communication with Mr. Collins and myself.

Q. So, you and Mr. Collins talked about this (p.78) affidavit before it was signed and that was part of the discussion, at least the information from these market surveys?

A. There are many conversations between Mr. Collins and myself relating to competition and that information is, I think, the basis for Mr. Collins' affidavit, not specific reports.

Q. Who has possession today of whatever specific reports exist?

A. I have copies of depletion reports as does Bill Finney. I have different price surveys.

Q. Price surveys that were done under your supervision?

A. That are done through someone through the house as a general part of our doing business.

Q. And when you say depletion reports, what are those documents?

A. Showing our case sales.

Q. Is that a monthly document or a weekly document or –

A. It's a monthly document, year-to-date sales primarily.

Q. Aside from the depletion reports you have just described and the market surveys you have described, are there any other documents that you looked at or Mr. (p.79) Collins looked at and relied upon to determine a loss?

MR. ROBERTSON: Mr. Starzyk earlier referred to general gallonage figures for the industry.

THE WITNESS: Those are the general reports that we use.

BY MR. BROWN:

Q. And those are the reports that you get from the State of Florida as to how many gallons were sold in a particular period of time?

A Yes.

Q. There's something I need to ask about Exhibits 1 and 2 just for clarification.

There are no indications on here as to whether this is dollars or gallons.

Do you happen to know?

A. Those are dollars.

Q. Dollars. Mr. Starzyk, it's true under Florida law, is it not, that you can give no more than 10 days credit to a vendor to whom you sell alcoholic beverages?

A. That's Florida law, I believe. I mean, there's more to it than that, but it's 10 days.

Q. When a vendor fails to pay within 10 days, you report them to the Department of Business Regulation; is that not right?

(p.80)

A. They are listed, yes.

Q. What is the effect on a vendor when you do that to them?

A. What is the effect on the vendor?

Q. Yes.

A. Well, if he doesn't pay his bills, then two things happen. One is he would have to be on COD.

Q. And what does that mean?

A. That means he would have to pay for his product on a cash basis, or it can go on a no-ship list.

Q. What is a no-ship list?

A. It means you are not legal – it's not legal to ship this particular account.

Q. And that would mean no distributor to ship to that vendor?

A. I believe that's the way it is, yes.

Q. And that vendor couldn't buy from any distributor unless he paid cash?

MR. ROBERTSON: I haven't been – all these questions have been calling for legal conclusions. I haven't been objection. If you are asking for his –

MR. BROWN: I'm asking his understanding.

MR. ROBERTSON: What his practical (p.81) understanding is?

MR. BROWN: That's what I want, his practical understanding of how it works.

MR. ROBERTSON: You can go to the statute if you want answers to these questions.

THE WITNESS: If you are listed – let me go back

If we do not receive payment, that customer is listed. He should not be – if you are listed with the State of Florida, you as a wholesaler are not allowed to ship him product.

BY MR. BROWN:

Q. In your experience – first, let me ask this:

McKesson often does that with vendors who are tardy in making payments; isn't that true?

A. Yes.

THE WITNESS: They list with the state.

BY MR. BROWN:

Q. Put them on the list, do whatever is permitted by Florida law under 561.42?

A. Right.

Q. In your experience that has been a fairly effective means of collecting debts from vendors; has it not?

(p.81)

A. It's not an effective means of collecting debts. It's a means by law that you cannot ship them product. But we have received so often from vendors – even when we receive bad checks and we have been shipping them, but by the time we get the bad checks, we haven't collected for the merchandise.

Q. Once a vendor gets on a list and cannot receive shipments of beverages from any distributor in the state, isn't it true that in the vast majority of cases he will correct that mistake and get the distributor paid?

A. Not true. We have suffered too many losses for that to be true.

Q. How much did you lose in dollar losses in the fiscal year 1985 as a result of vendors not paying you for beverage product?

A. I don't have the exact knowledge, but I'm going to approximate around $60,000.

Q. Out of a total –

MR. ROBERTSON: Are you talking about Miami now or –

THE WITNESS: Talking about Miami.

BY MR. BROWN:

Q. $60,000 that you never again saw, never collected?

(p.83)

A. Correct.

Q. Out of a total sales volume of what?

A. A total sales volume of 100 million dollars.

MR. BROWN: That's everything I have.

CROSS EXAMINATION

BY MR. TURNER:

Q. I have some questions. Mr. Starzyk, you are general manager of the Miami region; is that correct?

A. Yes.

MR. ROBERTSON: Vice-president, general manager.

BY MR. TURNER:

Q. Miami region; is that what you would call it?

A. Of Miami and Palm Beach.

Q. Now, your business apparently is called Miami Crown here?

A. It's a d/b/a, Miami/Palm Beach Crown.

Q. Miami/Palm Beach Crown. And you had a Pacific Crown in California that was closed; that is the company had it.

Is the word Crown a trademark through which McKesson Corporation does business as a distributor?

A. No.

Q. Why do you come about using the word Crown?

* * * * * * * *

(p.98)
BY MR. TURNER:

Q. The same costs that you have for grain neutral spirits.

For example, your Mohawk company buys grain based spirits that could be manufactured in Kansas?

A. They buy alcohol.

Q. Alcohol, that's a spirit, am I correct, when we say alcohol, that could be manufactured in Kansas and shipped to Michigan for bottling or –

A. You know, I really don't know. I don't know.

Q. You don't know where the spirit comes from?

A. I don't know.

Q. Could it come from more than one place?

A. It's possible. I don't know.

Q. Sir, let me ask you this:

As a person familiar with marketing, you don't know that it is, in fact, quite customary for spirits to be distilled in one location and shipped to another location either for blending or for bottling?

A. I'm not – I personally am not a producer or rectifier.

Q. But, you do know it's done?

A. In some way, shape or form, yes.

Q. Let me follow-up just a little bit on the last area that was explored by Mr. Brown.

(p.99)

If McKesson has a product that is made from grain, grain based spirit, and that product is put against a citrus based spirit and the citrus based spirit sells for a lower price, do I understand correctly your position is that you believe that that will cause less grain based products to be sold?

A. I'm saying that a lot of people's decisions are based on pricing, and whatever product is cheaper, then that consumer may buy that product based on price.

Q. So, the corollary of that would be then some of your grain based spirits that can't get down to that level might not move?

A. If it's not competitively priced, it's not going to move.

Q. I see. You are saying that you could take the option of lowering the price of that grain based spirit if it were possible to do that?

MR. ROBERTSON: If it were possible to do that?

BY MR. TURNER:

Q. Yes, or if you desired to do that I mean?

A. If it's possible to do it, yes.

Q. Okay. Now, if you don't carry the citrus based product that you believe is being put at a lower (p.100) price or being advantageously priced, how do you determine that you, McKesson, would have been able to sell more of the products that you carry as opposed to some other distributor selling those products?

A. Well, I look at the –

MR. ROBERTSON: Well, objection, asked and answered. You are asking him to repeat his earlier testimony about their studying of gallonage and –

MR. TURNER: No, no, I'm asking him to tell me how he knows that McKesson –

MR. ROBERTSON: Are you asking him do you have to carry a product in order to know how it sells?

MR. TURNER: No, I'm asking him the question. I want to know if he knows the answer or if he just has –

THE WITNESS: Ask me the question.

BY MR. TURNER:

Q. I'm asking you if a citrus based product is enabled to be sold in greater quantities than otherwise would happen because that citrus based product has a reduced tax, okay, how does –

(Brief Interruption)

BY MR. TURNER:

Q. Okay. Let me try it again.

(p.101)
It is your proposition, as I understand, that reducing the price on citrus based products causes more of those products to be sold and less of the products made from other type alcoholic bases; is that generally correct?

A. I believe that certain products will sell at certain prices, and if they are not competitive, those particular products will not sell.

Now, whether it's – you know, whatever base, but it's a matter of – you know, it's a matter of competitive pricing.

Q. All right. You are saying that without the – is it correct that you are saying –

A. A lot of products that I have, if I could sell them for five or six dollars cheaper because the cost was less expensive, then I could move a lot more of certain products.

Q. All right. But let's take the other side. Let's look at it from the standpoint of the citrus product that is receiving the reduced base or the reduced tax.

You are saying that that reduction in tax helps that product to move as against the product, the grain based product or whatever other base may not be receiving the benefit?

(p.102)
A. I'm saying –

MR. ROBERTSON: We will stipulate to that.

MR. TURNER: All right.

THE WITNESS: The grain produced product, whether it's a grain – it doesn't have to be – well, for example, let's take, for example, a rum.

MR. TURNER: I think your counsel has stipulated to my proposition that the reduction in tax will help that product move as against other products where it would not move but for the reduction in tax.

MR. ROBERTSON: We will stipulate to the proposition that when products compete, if one product pays a lower tax, it is a better competitor.

MR. TURNER: If you are not going to stipulate to my question, I need to ask the question again. I'm not interested in the way you phrase it. I want to phrase it the way I understand it.

BY MR. TURNER:

Q. All right, sir, is it correct that with a reduction in tax a citrus based product will move better as against a grain based product?

MR. ROBERTSON: Objection, vague and

* * * * * * * *

(p.123)

A. Well, I think pricing is very – pricing on a lot of products that we represent, if they had the same equal advantage as far as pricing goes, they would sell a lot more.

[BY MR. BROWN:]

Q. You testified earlier that the fact there is a tax advantage of some kind to a particular liquor or wine does not necessarily mean that

that tax advantage will be passed along by the manufacturer of that product; isn't that right?

MR. ROBERTSON: I think you are referring to what I said.

BY MR. BROWN:

Q. Do you have a whole different opinion from that?

MR. ROBERTSON: Could you state that again?

MR. BROWN: Let me try it one more time.

BY MR. BROWN:

Q. Is it your opinion that in some cases a manufacturer of a particular product may receive a tax advantage somewhere and not pass that tax advantage down the line to a distributor who deals with that product?

A. I'm not familiar with any of those situations.

Q. I'm sorry?

A. I said I'm not familiar with their situation.

(p.124)

Q. So, you don't know what pricing decisions the manufacturers are making?

A. All I know is what the costs are to me. I don't know if he is getting passed on a special tax or not. I have no knowledge of that.

Q. So, as far as you know, Bacardi could be receiving in Puerto Rico a tax advantage that, say, equated to five or six dollars a gallon but not be passing that on to you; isn't that true?

A. That's a possibility.

Q. And if all your distributors – excuse me, all of your manufacturers are all getting a five to six dollar a gallon tax advantage

under Florida law, for all you know, they may or may not pass that along to you; isn't that true?

MR. ROBERTSON: Well, the question is a hypothetical.

MR. BROWN: That's true, it's a hypothetical.

THE WITNESS: I don't know of any tax advantages that anyone is receiving and, therefore, I couldn't answer your question because I really don't know.

BY MR. BROWN:

Q. Let me just get back to one kind of basic question, and I realize that I am coming from a (p.125) consumer standpoint. I remember, for instance, when I was in high school –

MR. ROBERTSON: Are you saying that the state is a consumer?

(Discussion off the record.)

BY MR. BROWN:

Q. I seem to remember some of my colleagues back in high school didn't have a lot of money in their pockets, and so when it came to purchasing various beverages, they would consider price.

There were some beverages, however, no matter how low the price that none of the people I associated with would lower themselves to drink.

MR. ROBERTSON: We obviously went to different high schools, but go on.

BY MR. BROWN:

Q. Is there some point in a purchaser's mind they simply have a psychological (sic) distaste for a product and no matter what the price is they are not going to buy it?

MR. ROBERTSON: Some people?

BY MR. BROWN:

Q. Some of your customers?

A. Number one, my customers shouldn't be in high school because they should be a minimum of 21 years (p.126) old.

Q. I'm presuming that they are of legal age when I ask that question.

A. There are different reasons for people to purchase.

Some of them have been image. Some of it may be status. Some of it may be advertising to create it, so there are different things that turn different people on, and the things that I mentioned are one, but pricing is another, whether it's alcoholic beverages or anything.

Q. It is a fair statement though, is it not, that regardless of price among some of your customers there are simply some prejudices for whatever reason that exist which will make them decide nine times out of ten not to purchase a product regardless of how low it's priced?

A. There are examples where people will buy things not based on price, yes.

Q. In fact, isn't a lot of the marketing in the liquor industry geared to the creation of an image not related to price at all?

A. Some marketing is geared on image, some is geared on value, and some is geared on pricing, some is geared on convenience.

(p.127)

MR. BROWN: I have nothing further.

MR. TURNER: Thank you.

MR. BROWN: Thank you.

Are you all going to waive reading and signing on this?

(Discussion off the record.)

MR. ROBERTSON: For the purposes of the hearing on November 12th with respect to our motions for partial summary judgment and a preliminary injunction, we waive the review and signing of the transcript.

However, we reserve the right to object to the use of any portion of that transcript which is obviously inaccurate.

MR. BROWN: That's a half way – I don't know how to do that under Florida law, so what I'm going to suggest is on the record that I have requested a complete waiver of signing and –

MR. ROBERTSON: You have requested it. I'll give it to you for purposes of this hearing. For purposes of this hearing, we will waive review and signing.

MR. TURNER: You need to get a signature. You are going to get it signed.

MR. ROBERTSON: Well, we will ultimately –

* * *

(p.129)

(Court Reporter's Certificate Omitted in Printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed motions for partial summary judgment and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) under the federal Constitution. Defendants on November 4, 1986, responded with defendants' motion to dismiss.

McKesson submits that its memorandum in support of its motions establishes not only why this Court should grant McKesson's motions and declare the sections unconstitutional but also why this Court should deny defendants' motion to dismiss. Nevertheless, for the Court's convenience, McKesson in this memorandum will respond to defendants' arguments in their motion to dismiss.

Defendants in their motion contend that McKesson, which paid excise taxes under the Florida statutes, does not have standing to challenge the constitutionality of the statutes. Defendants also argue that the Florida statutes, which discriminate in favor of Florida's agricultural products, constitute a permissible regulation of commerce. Neither argument has merit.

I. THIS COURT CORRECTLY HAS DETERMINED THAT McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

At the November 12, 1986, hearing on McKesson's motions, this Court determined that McKesson has standing to challenge the constitutionality of the Florida statutes under the federal Constitution. In effect, the Court considered defendants' principal argument in their motion to dismiss and rejected defendants' position. This Court properly resolved the issue.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

The Florida Supreme Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), affirming this Court's judgment, adopted an expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. The Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under the decisions in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), McKesson plainly has standing to challenge the constitutionality of the Florida statutes in this Court. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (Collins' Affidavit, ¶¶ 3 and 4.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor, has paid the excise taxes on its products to the State whether its customers have paid for

products or not. (Collins' Affidavit, ¶ 4.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (Collins' Affidavit, ¶¶ 7 and 8.) As a result, McKesson has suffered economic losses. (Collins' Affidavit, ¶ 9.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.[1]

Parenthetically, the Court also should note that even defendants' representation that McKesson does not distribute any products that would qualify for the Revised Florida Products Exemption's tax preference but for its Take Back Provisions is inaccurate. For example, McKesson distributes Mt. Gay Rum from Barbados. (Collins' Affidavit, ¶ 8.) Mt. Gay Rum, which is manufactured from sugarcane, would qualify for the tax preference under section 565.12(1)(b), Florida Statutes (1985), but for the Take Back Provisions.

Barbados, by virtue of its status as a beneficiary country under the terms of the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. § 2702 (West Supp. 1986), and Presidential Proclamation 5133 of November 30, 1983, receives trade benefits from the United States for its alcoholic beverages. Under the Act, Barbados cooperates with the United States in administering the trade benefits. *See* 19 U.S.C.A. § 2702(c)(11). In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers by identifying export markets, providing export contacts, and providing marketing advice and guidance. Therefore, under the Florida law's Take Back Provisions, McKesson's Mt. Gay Rum from Barbados, which would

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[1] Florida cannot argue that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), rejected the dissent's similar standing argument.

otherwise qualify for a tax preference, is ineligible to receive Florida's unconstitutional tax break.

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION

In response to McKesson's contention that the Florida law purposefully and effectively discriminates against commerce from other states and countries, defendants argue that the Florida statutes cannot offend the federal Constitution because the statutes do not discriminate against commerce from *all* other states and countries. Defendants insist that the Florida statutes, which protect Florida Products, are constitutional because *some* other states and countries are able to produce the Florida products. In effect, defendants ignore that the constitutional issue is not whether the Florida statutes effectively discriminate against commerce from *every* other state and country, but whether it effectively discriminates against commerce from *any* other state or country.

When the United States Supreme Court, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), reviewed a North Carolina statute that discriminated against states that used more rigorous grading standards for apples than North Carolina used, the Supreme Court specifically noted that the statute did not discriminate against all states that exported apples to North Carolina but only against seven other states that had their own grading systems. The Supreme Court rejected North Carolina's argument that its statute did not distinguish states by name and ruled that the statute, which primarily imposed a barrier against Washington's apples, violated the Commerce Clause.

When the United States Supreme Court, in *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941 (1982), reviewed a Nebraska statute that discriminated against states that did not grant reciprocal rights to transport ground water, the Supreme Court determined that the statute, which did not discriminate against all states, operated as a barrier to

commerce between Nebraska and Colorado. The Supreme Court declared the Nebraska statute unconstitutional under the Commerce Clause. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

When the United States district court, in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), reviewed an Ohio statute that discriminated against states that produced low-sulfur coal rather than high-sulfur coal, the court recognized that the statute did not discriminate against all states. The district court voided the Ohio statute, which imposed a barrier against some states' coal exports, even though the statute did not specifically favor only Ohio products.

When the Florida Supreme Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), reviewed this Court's finding that a Florida statute discriminated against other countries that produced alcohol for gasohol, the Supreme Court agreed with this Court that the fact that the statute did not discriminate against other states did not save the law from constitutional attack. The Florida Supreme Court declared unconstitutional the Florida statute, which imposed a barrier against only foreign countries' products, under the Commerce Clause and the Import-Export Clause.

When the Supreme Judicial Court of Main, in *Private Truck Council of America v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986), reviewed a Maine statute that discriminated against states that imposed certain taxes on Maine trucks, the Court specifically rejected Maine's argument that the statute's discriminating "against only some, not all, foreign-registered trucks" made the statute constitutional. The Court noted that "Balkanization, even though only partial, is still Balkanization" and declared the statute unconstitutional under the federal Commerce Clause. *Id.*

Thus, when this Court considers McKesson's challenge to the constitutionality of the Revised Florida Products Exemption, this Court cannot sustain the Florida statutes simply because the Florida

legislature decided to permit a few other states, whose geography and climates allow them to produce the favored products, to petition Florida to participate in the discrimination against the disfavored products. Rather, this Court must declare the Florida statutes unconstitutional because the statutes discriminate against commerce from the majority of states whose geography and climate do not permit them to produce the favored agricultural products. As federal and state courts consistently have decided in similar cases, the Florida statutes' not discriminating against every other state and country simply does not redeem the statutes' unconstitutional discrimination against some states and countries.

Further, defendants' argument that the Florida statutes simply constitute a permissible regulation of commerce does not withstand analysis. Defendants repeatedly have invoked *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), for the proposition that a state may enact laws that have the purpose and effect of encouraging local commerce, but have not acknowledged that the Commerce Clause circumscribes the means by which a state may constitutionally seek to promote its own commerce. The Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), summarized the *Bacchus* holding:

> Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271 (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*id.* at 278].

Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. The tax statutes' purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. *See Dean Milk Co. v.*

Madison, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Defendants' citing to *Parker v. Brown*, 317 U.S. 341 (1943), does not rescue Florida's tax scheme. In *Parker*, the Court found that a California raisin marketing program had neither the purpose nor the effect of discriminating against interstate commerce, that the California regulations concerned intrastate rather than interstate transactions, and that the program's underlying policy comported with federal policies. *Id.* at 359-368. The Court concluded that the state program was a permissible regulation of local industry. *Id.* at 368. In contrast, Florida's tax scheme, which attempts to promote the sale of Florida products and discourage the sale of other states' and countries' products, directly discriminates against interstate commerce in both its purpose and effect, and directly conflicts with federal trade policies.

Even if the Florida statutes did not have a *per se* unconstitutional purpose and effect, they still would violate the Commerce Clause because they impose an excessive burden on interstate commerce.

Defendants fail to distinguish between Florida's discriminatory alcoholic beverages tax scheme and less discriminatory alternatives for the stimulation of the agricultural industry. Florida may not discriminate in favor of commerce in Florida's products and against commerce in other states' products because all producers will not compete on equal terms. In contrast, Florida may grant favorable tax treatment to Florida agricultural land because all who purchase Florida land receive equal benefits. Florida's non-discriminatory agricultural land tax reform does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not " 'impose a tax which discriminates against interstate commerce" by providing "a *direct* commercial advantage to local business.' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v.*

State Tax Commission, 429 U.S. 318, 329 (1977), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (emphasis added).

Florida may choose to use state revenues to promote Florida industry. However, if Florida chooses to tax the products sold within the State, it may not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 337 (1977).

CONCLUSION

McKesson's motions for partial summary judgment and a preliminary injunction establish that this Court must find the Florida statutes unconstitutional under the federal Constitution. Defendants' motion to dismiss, which challenges McKesson's standing and its Commerce Clause contentions, does not address McKesson's constitutional claims and does not provide a basis for avoiding McKesson's constitutional arguments.

Accordingly, this Court should grant McKesson's motions and deny defendants' motion.

Dated: November 21, 1986.

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S REPLY TO DEFENDANTS' MEMORANDUM OF OPPOSITION TO PLAINTIFF'S REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed motions for partial summary judgement and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) under the federal Constitution. McKesson also filed a supporting motion and memorandum requesting this Court to take judicial notice of records of official actions of legislative and executive departments, which constitute legislative history of the Florida statutes.

Defendants' memorandum in opposition ignores the significance of McKesson's request for judicial notice. The relevant Florida legislative history strikingly and unambiguously reveals the legislature's unconstitutional protectionist purpose in enacting the Florida statutes. Defendants invite this Court to err by urging the Court to ignore this legislative history and thereby neglect its federal constitutional obligation to determine the legislature's true purpose in enacting the statutes.

I. UNDER THE UNITED STATES SUPREME COURT DECISIONS CONCERNING THE COMMERCE CLAUSE, THIS COURT MUST DETERMINE THE FLORIDA LEGISLATURE'S TRUE PURPOSE IN ENACTING THE REVISED FLORIDA PRODUCTS EXEMPTION.

The United States Supreme Court has declared that state statutes that reveal a discriminatory purpose, or cause a discriminatory effect, are virtually *per se* invalid under the United States Constitution's Commerce Clause. *See Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624-26 (1978). Furthermore, the Court has squarely established that "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454 , 455 (1940).

Therefore, this Court has a federal constitutional obligation to determine the legislature's true purpose in enacting the Revised Florida Products Exemption.

II. UNDER THE UNITED STATES SUPREME COURT DECISIONS CONCERNING THE COMMERCE CLAUSE, THIS COURT MAY CONSIDER THE LEGISLATIVE HISTORY IN DETERMINING THE FLORIDA LEGISLATURE'S TRUE PURPOSE IN ENACTING THE REVISED FLORIDA PRODUCTS EXEMPTION.

Since, under the United State Supreme Court's decisions, the Court must determine the Florida legislature's purpose in enacting the statutes, the Court should consider the legislative history, which so plainly reveals that purpose.

Repeatedly, in challenges to state statutes on Commerce Clause grounds, the United State Supreme Court has reviewed legislative history to identify the state legislature's intent. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a challenged provision in response to the pleas

of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds).

The United State Supreme Court similarly has focused on legislative history in numerous other cases to find expressions of legislative intent. *See, e.g. Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking (sic) body, minutes of its meetings, or reports" may show discriminatory purpose); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-461 (1974) (legislative history provides clear expression of legislative purpose).

Defendants attempt to distinguish these cases by suggesting that the Court, although it considered the legislative history, did not decide the cases entirely upon the legislative history. Defendants' assertion, even if correct, misses the point. The fact that the courts may have relied on other grounds in striking the unconstitutional statutes does not diminish the fact that the court considered the legislative history. When a court must determine the legislature's true purpose in enacting a statute, as this Court must in this case, the court may consider the statute's legislative history. If the Court finds a protectionist purpose for the statutes -- and the legislative history will establish that purpose -- that finding alone is sufficient to condemn the statutes under federal constitutional law. The Court, of course, may decide to declare the statutes unconstitutional after considering other grounds.

Defendants' argument that the Court should ignore the Florida legislative history because the statutes are not ambiguous also is irrelevant. The Court in this case must review legislative history to determine the legislature's true purpose in enacting the statutes, not to determine the proper construction of the challenged statutes. The legislative history is critical to that task.

Defendants have offered this Court no evidence whatsoever that the legislature had any purpose other than ingeniously circumventing the

holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and preserving the former Florida Products Exemption's protectionist effect. The legislative history overwhelmingly establishes the Florida legislature's protectionist purpose in enacting the Revised Florida Products Exemption. This Court may resolve this case on the legislative history alone.

CONCLUSION

Federal constitutional law requires this Court to determine the Florida legislature's true purpose in enacting the Revised Florida Products Exemption. In discharging its obligation, the Court need look no further than the legislative history, which unequivocally establishes the legislature's protectionist purpose. The United States Supreme Court's admonition in *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), that "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious" applies in this case. The old Florida Products Exemption was forthright in its discrimination, and was unconstitutional. The Revised Florida Products Exemption is ingenious in its discrimination and it, too, is unscontitutional.

The Court should grant McKesson's request that the Court take judicial notice of the legislative history.

Dated: November 24, 1986.

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PORTIONS OF AFFIDAVITS OF HAROLD P. OLMO AND ANNE E. PECK

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed affidavits in support of its motion for partial summary judgment and for a preliminary injunction. Defendants on November 3, 1986, filed a motion to strike portions of two of those affidavits: Dr. Harold P. Olmo's affidavit and Dr. Anne E. Peck's affidavit. McKesson submits this memorandum to respond to defendants' arguments in their motion to strike.

Defendants in their motion contend that Dr. Olmo and Dr. Peck are not competent to testify to particular matters in their affidavits, and that they do not establish the factual basis underlying certain of their opinions. Defendants, however, do not challenge Dr. Olmo's or Dr. Peck's credentials to speak to the Court as expert witnesses. Nor do defendants suggest that either Dr. Olmo's or Dr. Peck's statements are factually incorrect in any respect. Rather defendants in this motion suggest that Dr. Olmo, one of the world's foremost authorities on the cultivation of grapes used for wines, and Dr. Peck, one of the nation's principal authorities on agricultural economics, are not qualified to make statements concerning fundamental propositions within their areas of expertise.

I. THIS COURT MAY CONSIDER THE OLMO AFFIDAVIT.

Defendants contend that Dr. Olmo may not make basic statements about why manufacturers of wines and wine coolers generally use certain grape species in light of consistent consumer preference, and that, therefore, grape producers who grow the preferred species have an advantage over grape producers who cannot grow the preferred species. (Olmo's Affidavit, ¶ 5.) In support of their contention, defendants cite *Prohaska v. The Bison Co., Inc.*, 365 So. 2d 794 (Fla. Dist. Ct. App. 1978), in which the court states that witnesses who have "no special knowledge or skill and had no professional training or experience of any sort" in the relevant subject matter may not offer expert testimony. *Id.* at 797.

Dr. Olmo has been a professor of viticulture for almost 40 years. In addition to his academic training and experience, he has been retained by governments throughout the world as a consultant in the cultivation of grape varieties. In recognition of his standing and expertise, he has been a Fellow at the American Association for the Advancement of Science, a Guggehhein Research Fellow, and a Fulbright Research Scholar. In recognition of his contribution to the science of wine production, he received an Award of Merit from the American Wine Society and an Award of Merit from the American Society of Enology and Viticulture. (Olmo's Affidavit, ¶ 2.)

Dr. Olmo, with more than 50 years experience in the field, does not need to recite a market survey to generate details explaining consumer preference in wines. Moreover, his opinion, that grape producers who grow the *Vinifera* species have had a competitive advantage over grape producers who cannot grow the *Vinifera* species, is preceded, quite clearly, by the factual predicate. (Olmo's Affidavit, ¶ 5.)

In light of the above, defendants' argument challenging Dr. Olmo's affidavit is frivolous.

II. THIS COURT MAY CONSIDER THE PECK AFFIDAVIT.

Defendants contend that Dr. Peck, who, while at Stanford, Harvard, and Purdue, taught courses on agricultural prices and markets (Peck's Affidavits, ¶ 2.) is not qualified to make fundamental statements about agricultural prices and markets. For more than 15 years, Dr. Peck has studied issues concerning commerce in agricultural products. Her experience, both domestic and international, in agricultural economics, includes service as Director at the American Agricultural Economics Association and advisor to the Food and Agriculture Organization of the United Nations. *Id.*

Defendants cite Husky Industries, Inc. v. Black, 434 So. 2d 988 (Fla. Dist. Ct. App. 1983), for the proposition that expert testimony must have a factual basis for any opinions advanced. Much of Dr. Peck's affidavit reports facts rather than opinions. Where Dr. Peck states an opinion, as in paragraph 8, 9, 11 and 13, the factual predicate is plainly stated.

Defendants do not suggest for a moment that manufacturers of alcoholic beverages cannot use various agricultural products to make alcohol. Indeed, at the hearing on November 12, defendants did not even respond to McKesson counsel's statement of basic fact that manufacturers of alcoholic beverages -- such as vodka -- can manufacture vodka from any number of agricultural products. Instead of attempting to offer a factual challenge to Dr. Peck's affidavit, defendants in their motion offer such arguments as urging the Court to strike phrases such as "commercially significant amounts." The phrase, commonly used by economists, is based on United States Department of Agriculture statistics, which are used by all agricultural economists. Dr. Peck simply deduced that any state included in the U.S.D.A. crop report produces that crop in commercial significant amounts; and, any state not included in the U.S.D.A. crop report does not product that crop in commercially significant amounts. Phrases such as "commercially significant amounts," uncommon nor nebulous, and requiring Dr. Peck to include a detailed explanation of what such phrases mean would turn a relatively brief affidavit into a

Dr. Peck in her affidavit states in economic terms, regarding competition in markets, what the Supreme Court has been stating in legal terms since Guy v. Baltimore, 100 U.S. 434 (1880). Products from various states and countries freely compete in the American marketplace. When a state discriminates in favor of its own products, the free market, in which some products are advantaged and other products are disadvantaged, is distorted.

CONCLUSION

Neither plaintiff nor defendants dispute the fundamental facts in this case. Dr. Olmo and Dr. Peck report what everyone knows. The majority of states produce agricultural products that can be used to make alcohol for alcoholic beverages. However, many of these states that produce one or more of these agricultural products cannot produce citrus or sugarcane, and do not produce the Florida grape species. Therefore, when Florida intervenes in the market and discriminates in favor of Florida's products, Florida's intervention necessarily has an effect on interstate commerce.

In addressing the issues before it, this Court may consider these two expert's observations and opinions.

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